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AN INTRODUCTION
to
CANADIAN ADMINISTRATIVE LAW

By

ARTHUR ANGLIN

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HARVARD LAW SCHOOL

1923



AN INTRODUCTION

to

THE STUDY OF

BY

ALFRED H. MARRAS

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1910

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PREFACE

There is a growing and important body of administrative law in Canada which so far has provoked only desultory and inadequate reference in the periodical law journals. One is particularly struck with the fact that the general background of constitutional questions involved in this field of administrative law have themselves as yet received little or no treatment on the part of text writers. A particular corner of the field cannot be properly studied without continual reference to those general principles in the background. An effort has been made, therefore, in this paper to cover the necessary introductory topics. Part I deals with the nature of the Canadian federal system and its relation to the British Empire in an endeavour to bring out those features which must be kept in mind when studying the administrative law of a country which is not a sovereign state. Part II deals with the constitutional question of delegation by a colonial legislature to ascertain how far it may resort to administrative bodies for the purpose of making rules and regulations. Part III is really more than introductory. It is an intensive examination of the scope and effect of judicial review of the Colonial Governor in Council. It serves however to bring out those general principles to be kept in mind when studying the judicial review of any administrative agency. Such principles emerge more clearly from a study of this agency as it is the one upon which the legislature has spent the least effort to define or refine its process.

PART I

THE CANADIAN FEDERAL SYSTEM

I. THE RELATION OF THE PROVINCIAL TO THE DOMINION GOVERNMENT

Before attempting to review the field in general or to examine any corner in particular of administrative law in Canada, it is necessary to appreciate the precise nature of the Canadian federal system and the relation of that system to the Imperial constitution.

Is Canada a federation or a confederation? In 1914 Lord Haldane remarked during the argument of an Australian case (1) on appeal in the Judicial Committee of the Privy Council:

"..... in Canada there is no federal system. What happened was this:- An Act was passed in 1867 which made a new start and divided certain powers of government, some being given to the Parliament of Canada, and some to the Parliament of the Provinces. The Provinces were created de novo. The Provinces did not come together and make a federal arrangement under which they retained their existing powers and parted with certain of them and an Imperial statute has got to ratify the bargain; on the contrary, the whole vitality and ambit of the Canadian constitution was a surrender, if you like first, and then a devolution..... The meaning of a Federal government is that a number of states came together and put certain of their powers into common custody, and that is the Federal Constitution in Australia, but in Canada not at all." (2)

In rendering judgment in the case he said further:

"The British North America Act of 1867 commences with a preamble that the then provinces have expressed their desire to be federally united into one Dominion with a constitution

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- (1) Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd. (1914) A.C. 237.
(2) Times Law Reports, XXX, p. 205 (1914).

THE HISTORY OF THE

REPUBLIC OF THE UNITED STATES OF AMERICA

The first of the great principles of the American Republic is the principle of the separation of powers. This principle is the foundation of the American system of government. It is the principle which has made the American Republic the most perfect of all the governments of the world. It is the principle which has made the American Republic the most powerful of all the governments of the world. It is the principle which has made the American Republic the most beloved of all the governments of the world.

The second of the great principles of the American Republic is the principle of the rights of the individual. This principle is the foundation of the American system of government. It is the principle which has made the American Republic the most perfect of all the governments of the world. It is the principle which has made the American Republic the most powerful of all the governments of the world. It is the principle which has made the American Republic the most beloved of all the governments of the world.

The third of the great principles of the American Republic is the principle of the rights of the majority. This principle is the foundation of the American system of government. It is the principle which has made the American Republic the most perfect of all the governments of the world. It is the principle which has made the American Republic the most powerful of all the governments of the world. It is the principle which has made the American Republic the most beloved of all the governments of the world.

The fourth of the great principles of the American Republic is the principle of the rights of the minority. This principle is the foundation of the American system of government. It is the principle which has made the American Republic the most perfect of all the governments of the world. It is the principle which has made the American Republic the most powerful of all the governments of the world. It is the principle which has made the American Republic the most beloved of all the governments of the world.

The fifth of the great principles of the American Republic is the principle of the rights of the future. This principle is the foundation of the American system of government. It is the principle which has made the American Republic the most perfect of all the governments of the world. It is the principle which has made the American Republic the most powerful of all the governments of the world. It is the principle which has made the American Republic the most beloved of all the governments of the world.

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similar in principle to that of the United Kingdom. In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions." (1)

This view of Viscount Haldane's has not met with general acquiescence. (2) Professor Jethro Brown contends that it reveals an entirely erroneous conception of the nature of a federation, and confuses federate with confederate unions. (3) It is certain that if we agree that a federation is "a union of component states, wherein there is a central legislature which has authority to pass laws directly obligatory upon the people, the component states also have legislative power" and that "in confederations, on the other hand, the central body has relations with the component states only, and indirectly with the individuals" (4) then we cannot class the present system in Canada as anything but federal. (5)

(1) Times Law Reports, XXX, p. 205, 207; (1914) A.C. 237, 252-3. See also Bonanza Creek Gold Mining Co. v. Rex (1916) 1 A.C. 566, 579.

(2) See remarks of Sir Robert Borden in Canadian Historical Review, vol. II, p. 272 (Toronto, 1921). See also (1914) 34 Canadian Law Times 225.

(3) Brown: The Nature of a Federal Commonwealth, 30 L.Q.R. 301, 305 (1914).

(4) Scott: The Canadian Constitution Historically Explained, p. 3 (London, 1918).

(5) Bryce: Studies in History and Jurisprudence, pp. 392-3; 408-9 (Oxford 1901).

Lord Haldane seems to have been the only member of the Privy Council to have attempted to analyse the process by which the Canadian federal system was brought into existence, and in so doing he has been led to confuse the historical processes with their resultant. The others have accepted the objective means of its attainment and disregarded the form. To debate on whether there was a surrender and a repartition is to indulge in niceties which do not advance us far in the understanding of the Canadian constitution and its practical working.

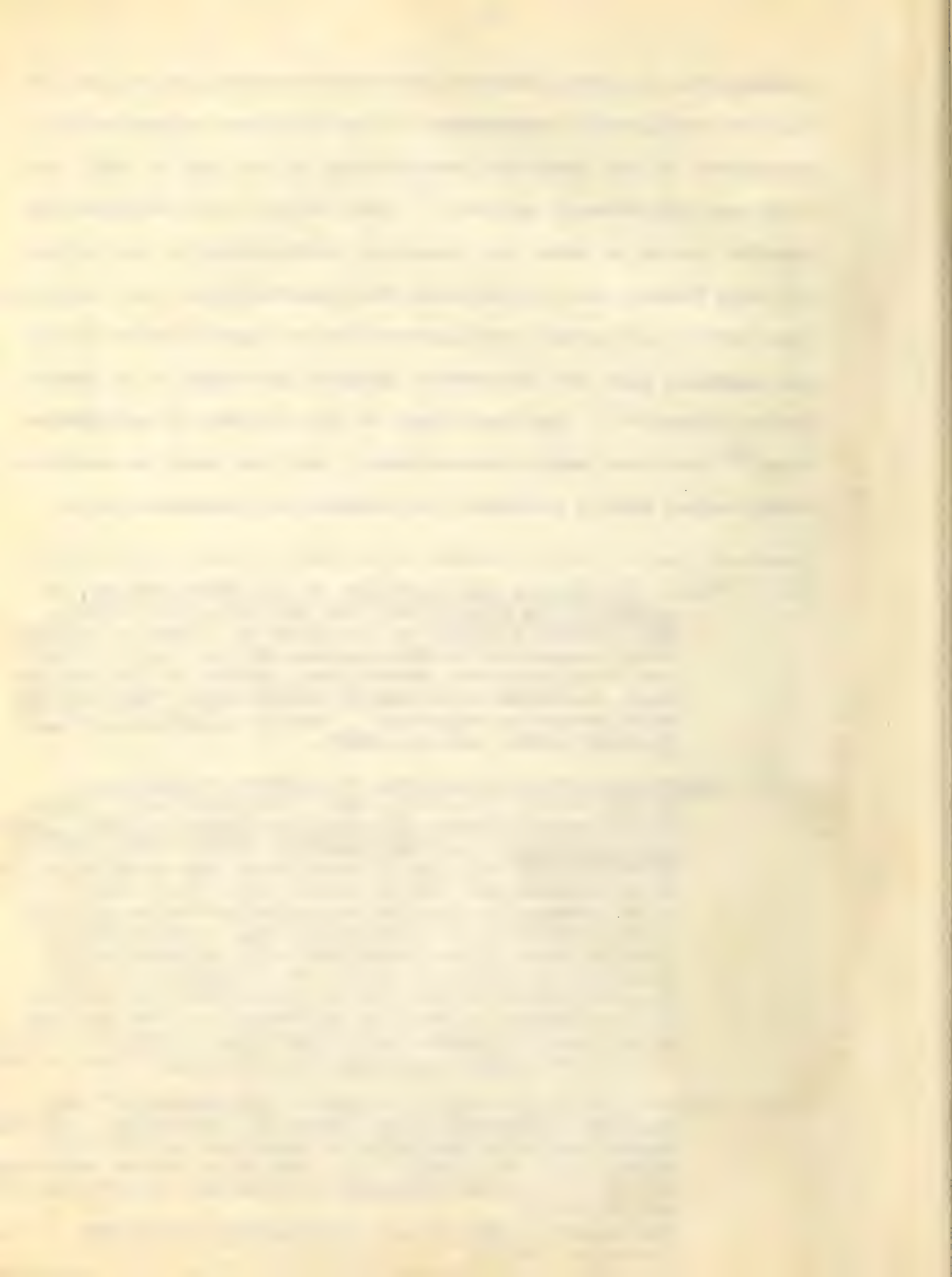
In searching for these principles which underlie the federal system our starting point is, of course, the British North America Act passed by the Imperial Parliament in 1867. This is far from saying that the British North America Act is the Canadian constitution.⁽¹⁾ The Canadian constitution differs from that mainly unwritten constitution of the United Kingdom only in that it includes a fundamental written law which serves to distribute legislative authority between the component elements of the federation. It differs from the constitution of the United States in that nothing but the framework of government was delineated in the written instrument. No attempt was made to write into the British North American Act any so called fundamental principles of natural justice; instead, the Act is

(1) Lefroy: A Short Treatise on Canadian Constitutional Law. pp. xli and 40ff. (Toronto, 1918); Low: The Government of England, p. 2 (New York, 1915) defines the constitution of Canada as a written constitution created by Parliamentary enactment.



interpreted as being clothed with the unwritten principles of British responsible government. Thus only one new principle was added to the Canadian constitution by the Act of 1867 and that was the federal system.⁽¹⁾ But the Act was deliberately drafted so as to avoid any clear-cut definition of the nature of this federation, the authors well appreciating that anything else would not permit the constitution of Canada to be as far as possible like its successful English prototype - "A growth, not a fabric."⁽²⁾ The foresight of the fathers of confederation⁽³⁾ has been amply demonstrated, and they must be credited with having made a distinct and fascinating contribution to

- (1) Flint: The Theory and Practice of the Constitution, in Canadian Law Times, vol. 28, pp. 114, 115 (1908). Sir Wilfred Laurier in the House of Commons, Sept. 30, 1891, remarked: "Confederation did not give us any new constitutional powers; any powers we had not before, Confederation simply consolidated together the self-governing colonies." Canada: House of Commons Debates (1891) III, p. 6316.
- (2) Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571, 586. (Supreme Court Reference Case); Pollard: The British Empire - Past, Present and Future, p. 295. (London, 1909) "Thus with a Governor-General, who is much more important socially than politically, and a Senate which does what it is told, Canada is perhaps the most democratic country in the world." This statement will need modification in view of the constitutional changes in the function of the House of Lords in England in 1911. Viscount Bryce in his Modern Democracies (New York, 1912) appears to consider Australia and New Zealand in advance of Canada as a democratic community. See also Bryce: Canada - An Actual Democracy (Toronto, 1921.)
- (3) At the time of the union the word "confederation" was employed deliberately by those who advocated a strong federation with subordinate provinces in order to carry their proposals. The term thus gained currency and is still used although its natural connotation is not intended.
See Kennedy: The Nature of Canadian Federalism, p. 8, (Toronto, 1921).



the science of federalism in the British Empire.⁽¹⁾

The British North America Act⁽²⁾ although a statute passed by the Imperial Parliament, was in essence the embodiment of an agreement between high contracting parties⁽³⁾ Canada,⁽⁴⁾ New Brunswick, and Nova Scotia. Delegates from these self-governing colonies met at Quebec in 1864 and there drew up seventy-two resolutions which were submitted to the British authorities and became substantially the Act of 1867. Our space is too limited here to permit a survey of the forces which led to a desire on the part of these colonies to federate.⁽⁵⁾ In general the theory of the Act is the result of a combination of the principles of the British Constitution and

- (1) Canada was the first of the British colonies to secure responsible government instead of representative government. See Scott: The Canadian Constitution, p. 72 (Toronto, 1918). Rowell: The British Empire and World Peace, pp. 78-80, 161-164 (Toronto, 1922). Canada was also the first dominion to secure self-government on a federal plan which embodied the British constitutional practice. Rowell: op. cit. pp. 164-166.
- (2) 30 Vict., cap. 3. An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government Thereof; and for Purposes connected Therewith. "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom:"
- (3) Policy: The Federal Systems of the United States and the British Empire: p. 274. (Boston, 1913).
- (4) In 1840 Upper and Lower Canada were united into the Colony of Canada, Union Act, Imp. 3-4 Vict. c. 35. The British North America Act, 1867, divided Canada into the provinces of Ontario and Quebec.
- (5) Lefroy: A Short Treatise on the Canadian Constitution, pp. 1-35 contains a concise account of such forces.

CHAPTER I. THE DISCOVERY OF AMERICA.

IN THE YEAR 1492, CHRISTOPHER COLUMBUS, an Italian navigator, discovered the continent of America.

He sailed from Spain in the month of August, and after a long and dangerous voyage, he reached the coast of America on the 12th of October.

He was the first European who discovered the continent, and his discovery opened a new world to the eyes of the world.

From that time, the continent of America has been the scene of many great events, and has become one of the most important parts of the world.

It has been the seat of many wars, and has produced many great men, who have done much for the world.

It has also been the seat of many great discoveries, and has produced many great inventions, which have done much for the world.

It has been the seat of many great revolutions, and has produced many great changes, which have done much for the world.

It has been the seat of many great improvements, and has produced many great advances, which have done much for the world.

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so much of the constitution of the United States as the fathers thought served their main purpose of setting up a federation.

One force is, however, of importance in throwing light on the radical difference between the federal system of Canada and that of the United States. There was a prevailing, although completely erroneous, opinion at the time of the Quebec Resolutions that the Civil War in the United States was in great measure the result of the central government having been constituted with too little authority along certain lines.⁽¹⁾ This the Fathers sought to obviate in their experiment with federalism. Accordingly to the extent of plenary power which was to be divided between the provincial and dominion governments, in the restrictions placed on the governments in their respective fields, and in the location of the balance of power, we find an attitude adopted which differed greatly from that of the Fathers of the American Constitution.⁽²⁾

(1) Power: The Canadian Constitution in 14 Law Notes (N.Y.) 27, 29 (1910).

(2) For a brief comparison of the federal systems of the United States and Canada see Lefroy; The Law of Legislative Power in Canada. (Toronto, 1897), Poley: The Federal Systems of the United States and the British Empire (Boston, 1913), Wrong: The United States and Canada: A Political Study. (New York, 1921).

A. Distribution of Powers

In Canada the British North America Act apportions full control over internal affairs between the central and local governments, where in the United States there is no intention of dividing the entire powers between the legislatures alone. "The powers distributed between the Dominion on the one hand, and the provinces on the other, cover the whole area of self-government within the whole area of Canada."⁽¹⁾ On the other hand, "the powers affecting the internal affairs of the states not granted to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the constitution are reserved to the people of the United States."⁽²⁾ In thus accepting the supremacy of the Canadian legislatures the Act fulfilled the desire expressed in the preamble to have "a constitution similar in principle to that of the United Kingdom" where, as Professor Dicey remarks, "the sovereignty of Parliament

(1) Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571, 581. See Clement: Canadian Constitution pp. 398-9 (Toronto, 1916) and Lefroy: Short Treatise on Canadian Constitutional Law, pp. 78-9 (Toronto, 1918). Lord Balfour: "It is not an expression which you must ride to death because in the case of the Constitution of Canada, enormous though the powers are, there are some things which are not delegated with regard to succession to the Crown and matters of that kind. They belong to the Sovereign Parliament, they are not delegated." In arguendo Attorney-General for British Columbia v. Attorney-General for Canada (1914) A.C. 153 (verbatim report, pp. 90-1), cited by Lefroy, op. cit. fn. 76.

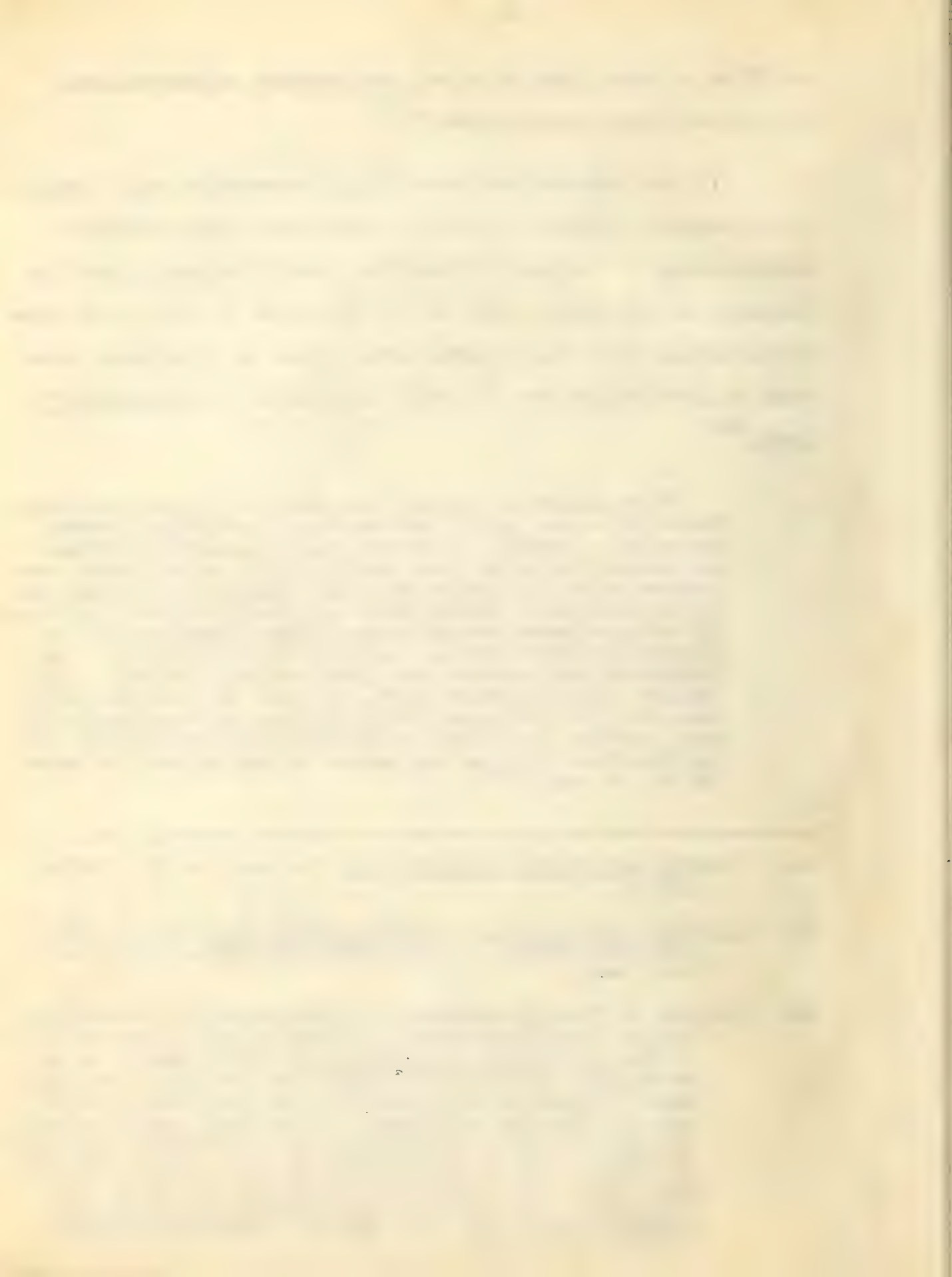
(2) State of Kansas v. State of Colorado, 206 U.S. 46, 90. Constitution of the United States, Tenth Amendment: The powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.

is (from a legal point of view) the dominant characteristic of our political institutions."⁽¹⁾

If the dominion and provincial governments were intended to be supreme in their fields of general and local affairs respectively it follows that neither should be considered the delegate of the other. And so the decisions of the courts have consistently held, the classic enunciation on this point being made by Lord Watson for the Privy Council in the Liquidator's Case:⁽²⁾

"The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a central government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative.... As regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the act."⁽³⁾

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- (1) Dicey: Law of the Constitution, 8th ed., p. 37 (London, 1915).
- (2) The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick (1892) A.C. 437, 441, 442.
- (3) Orders in Council admitting and Dominion Acts establishing new provinces have all provided that the provisions of the British North America Act, 1867, shall, with some minor variations in each case not affecting the main features of the constitution, be applicable to each of the said provinces "in the same manner and to the like extent as they apply to the several provinces of Canada, and as if (each of the said provinces) had been one of the provinces originally united by the said Act." See Lefroy: Short Treatise on Canadian Constitutional Law, pp. 37, 38. (Toronto, 1918).



Lord Watson accepted the fact of Canadian federalism without stopping to theorize as to how it was brought about.⁽¹⁾ Lord Haldane seems to be the only member of the Privy Council who has been troubled with the use of the term federal when applied to the Canadian system where the central and local governments embody no principle of delegated authority. Let us note in passing that Lord Watson is not in accord with Lord Haldane in considering that "the provinces were created de novo" on the passing of the Act. The constitutions of New Brunswick and Nova Scotia were, subject to provisions of the Act, continued as they had previously existed.⁽²⁾ The Act, in dividing Canada into Quebec and Ontario, also expressly continued "all powers, authorities, and functions" vested in the executives, subject of course to those provisions pertaining to changes on behalf of the new federal government.⁽³⁾ The provincial governments to-day possess the executive authority which they had before the union minus those powers allotted to the central government by the Act of 1867.

(1) Kennedy: The Nature of Canadian Federalism, p. 11 (Toronto, 1921).

(2) British North America Act, 1867, § 64, 88

(3) Id. § 65.

B. Restrictions on Legislative Powers

Turning now to our second point of comparison between the constitutions of Canada and the United States, we shall see to what extent the central and local governments may exercise the authority allotted to them in each case. In the American Constitution it is laid down that "no state shall.... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts",⁽¹⁾ nor "deprive any person, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."⁽²⁾ As to Congress itself, the same restrictions are made except the impairment of the obligation of contracts.⁽³⁾ No such limitations are made on Canadian legislatures in the British North America Act. Mr. Justice Brewer, speaking for the Supreme Court of the United States, once remarked that "it is the peculiar value of a written constitution that it places in unchanging form limitations on legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking."⁽⁴⁾ He apparently did not appreciate the advantages of a responsible government as compared with a representative government, for Canadians would never concede that they lived under an unstable form of government. Should any of their governments abuse the unlimited power which

(1) Constitution of the United States, Art. 1, sec. 10 (1).

(2) Ibid, 14th Amendt.

(3) Ibid, Art. 1, Sec. 9.

(4) Muller v. State of Oregon, 208 U.S. 412, 420.

they are given public opinion would immediately demand a resignation of the Cabinet and a resort to the polls.⁽¹⁾

To the provincial legislatures is assigned the exclusive control of property and civil rights,⁽²⁾ the only limitation being that the subject matter dealt with shall not have been assigned to the federal government, e.g. bankruptcy, patents, copyrights, divorce, fisheries; nor be inconsistent with federal legislation passed under the "peace, order, and good government clause."⁽³⁾ Thus an Ontario Court was on firm constitutional ground when it remarked, "if the plaintiff acquired any rights the legislature had the power to take them away. The prohibition, 'Thou Shalt not Steal', has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the legislature as is found in some states."⁽⁴⁾ American constitutional restrictions on the 'right of eminent domain'

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- (1) The Attorney-General of Canada v. The Attorney-General of the Provinces (1898) A.C. 700, 713. (Fisheries Case) Per Lord Herschell: "The suggestions that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."
- (2) British North America Act, 1867, Sec. 92, (13).
- (3) Ibid. Sect. 91.
- (4) Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd. 1800. L.R. 275, 279. (1908). This view of the law was approved by the Ontario Court of Appeal and by the Privy Council in affirming the judgment in 102 L.T. 375, (1910).

are not to be found in Canada. The legislature may divest A of his fee in Blackacre and vest it in B without compensation.⁽¹⁾ The legislature may impair the obligation of a contract⁽²⁾ provided the contract is such as to come within the scope of its specified authority,⁽³⁾ and it may pass legislation of an ex post facto character.⁽⁴⁾ It may impose taxes without regard to uniformity or equality.⁽⁵⁾ When such enactments of the legislature are called in question before the courts, the bench cannot set them aside as void upon the ground that they are against public policy for "no such doctrine can apply to an Act of Parliament."⁽⁶⁾ Parliament does not hesitate whenever occasion calls to legislate away any part or all of what Magna Charta made the law of the realm,⁽⁷⁾ and "habitually interferes, for the public advantage, with private rights. Indeed, such interference has now (greatly to the benefit of the community)

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- (1) McGregor v. Esquimalt and Nanaimo Ry. (1907) A.C. 462; Wilson v. Esquimalt and Nanaimo Ry. (1922) A.C. 202.
 - (2) L'Union St. Jacques de Montreal v. Dame Belisle, L.R. 6 P.C. 31. (1874). Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, (1892) A.C. 437.
 - (3) Royal Bank v. The King, (1913) A.C. 283.
 - (4) License Commissioners of Prince Edward County v. County of Prince Edward, 25 Gr. 452, 2 Cart. 378, (1879); Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd. 102 L.T. 375, (1910).
 - (5) Fortier v. Lambe (1894) 25 B.C.R. 422.
 - (6) Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada, (1912) A.C. 571, 583; (The Supreme Court Reference Case). See also Riel v. The Queen, (1885) 10 A.C. 675, 678.
 - (7) Smith v. The City of London, 20 O.L.R. 133, 140, (1909) Riddell, J., remarks that much of Magna Charta is obsolete.

become so much a matter of course as hardly to excite remark... The statute book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons.... but no one will realize the full action, generally the very beneficial action, of Parliamentary sovereignty, who does not look through a volume or two of what are called Local and Private Acts".⁽¹⁾

But we cannot dismiss the question of restrictions on the legislature under the Canadian constitution without considering the matter of disallowance of Dominion and Provincial Acts. By Sect. 56 of the Act the right of disallowance of federal acts is reserved to the Queen in Council, and Sect. 90 permits the Governor-General in Council to disallow such provincial legislation as is deemed advisable.⁽²⁾ The matter of

(1) Dicey: Law of the Constitution, 8th ed., pp. 46-47. (London, 1915). Riddell: The Constitution of Canada in its History and Practical Working (New Haven, 1917). Lecture IV: A Comparative View, contains many interesting comparisons of Canadian and American constitutional powers.

(2) The original view of the Colonial Office that it had the authority in spite of the Act to disallow Provincial legislation was abandoned about 1875 after repeated attacks by the Canadian Ministers. The Dominion Government now acts in this matter at the request of the Imperial Government when the latter consider their interests to be infringed by the Provinces. See Keith: Responsible Government in the Dominions, II, pp. 726-732. (Oxford, 1912).

On disallowance of Provincial legislation in Canada, see Keith: Responsible Government in the Dominions, II, pp. 725-749, and War Government in the Dominions, pp. 299-301 (Oxford, 1921), Lefroy: Canada's Federal System, pp. 30-44 (Toronto, 1913) and A Short Treatise on Canadian Constitutional Law, pp. 62-66 (Toronto, 1918), and Clement: The Law of the Canadian Constitution, pp. 151-156 (Toronto, 1916). A Provincial statute disallowed has, however, full force and effect until date of its disallowance. Rights established under it cannot be disturbed. Wilson v. Esquimalt and Nanaimo Ry. (1922) 1 A.C. 202.

Imperial disallowance is postponed for the moment and will be considered in discussing the relation of Canada to Great Britain.

In Dominion disallowance we have a feature in the Canadian constitution which seems to run counter to the intention of the Fathers to adopt British constitutional practice. That the disallowance clause should have been put into the Act in spite of its Preamble is to be explained as being one of the methods by which the Fathers sought to strengthen the hands of the central government. The Fathers might have included in the Act a specific restriction on legislative power by means of sections similar to the 5th and 14th amendments of the Constitution of the United States, but that would have impugned the British constitutional principle of the supremacy of Parliament. The method they did adopt was a compromise, and, we submit, a happy one at that, for a veto power in the hands of a responsible executive is far more amenable to the popular will than is the interpreting of a "due process" clause by a judiciary appointed for life. Thus the Fathers did not necessarily contravene the preamble to their Federation Act. The veto of the Crown may be obsolete in England, but was it not a stroke of wise statesmanship to revive such a prerogative in the hands of the King's representative in Canada when her scattered provinces launched forth on a bold experiment in federation of a new type to the empire and the world? The abuse of the veto power of the Governor-General was sufficiently guarded against by the constitutional convention that he must act in a council which itself was amenable to the representatives of the people.

Although it is clear from the debates in federation (1) that the incorporation of the Dominion veto in the act was to further and support federal unity as a matter of political expediency, to protect the interests of minorities rather than the private rights of individuals, we find that the Governor-General on the advice of his ministers has on occasion employed the veto power in a jural capacity in behalf of the latter class. Mr. Doherty, as Minister of Justice in the Dominion Cabinet, 1912, in reporting on a provincial statute to the Governor-General in Council, said there was "no doubt that the (veto) power is constitutionally capable of exercise and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes intra vires of the Legislatures." (2) In spite of this perversion of the veto power it is significant that no fixed policy is being developed by the successive cabinets responsible for its exercise, although, fortunately, this is not to say that it has been made the instrument of party politics. (3) Mr. Doherty's immediate predecessor declared in the House of Commons: "I entertain in all

(1) Parliamentary Debates on the Subject of Confederation, p. 690 (Quebec, 1865)

(2) LeRoy: Treatise on Canadian Constitutional Law pp. 63-64. (Toronto, 1916).

(3) On the extent to which the power of disallowance has been exercised by the Dominion Government see Young: "Disallowance of Provincial Statutes" in Canadian Law Times vol. 30, pp. 385, 387 (1910).

honesty and sincerity the view that it is of vital consequence to the well-being of this Dominion that the rights of the Provinces to legislate within the scope of their authority should not be interfered with, and that every Provincial Legislature, within the limits prescribed for it by the terms of the British North America Act, is and ought to be supreme. I believe that this is a principle of greater importance to the welfare of this Dominion as a whole than even the sacredness of private rights or of property ownership."⁽¹⁾ This is the stand taken by the Provinces. Although as recently as 1918 the Dominion Government disallowed an Act⁽²⁾ of the legislature of British Columbia on the ground that it infringed proprietary rights, its action was not wholly at variance with such a policy. Disallowance of the statute in question can be supported on the ground that it impaired an agreement to which the Dominion government itself had been a party so that it would have had to share the responsibility of repudiation.⁽³⁾

The Provinces cannot present as convincing a case for home rule in their own field when their acts directly affect federal authority and federal issues. It is here that they must realize that they are partners in an endeavor to achieve the fruits that a federation will yield them and that the fruits will be the riper

(1) Canada: House of Commons Debates, 1909 p. 173

(2) 7-8 Geo. 5, c. 71, British Columbia (1917)

(3) The Canadian Law Times, vol. 38, p. 445 would apparently support disallowance in this case even if the Dominion Government had not been a party to the original agreement.



the more they attempt to shape through their representatives at Ottawa constitutional convention which will operate on the disallowance clause in the interest of all concerned. When the British North America Act has become the mere skeleton of the Canadian Constitution the power of Dominion veto will probably have been long forgotten. Australia and South Africa did not include such a feature in their respective unions. But certain it is that in spite of the numerous protests of the Provinces the wisdom of the Canadian Fathers on this feature of their instrument has not as yet been seriously doubted. Although the parallel is not perfect, it is significant that the power of disallowance reserved to the Imperial authorities has already reached the stage we have ventured to anticipate for Dominion disallowance of Provincial legislation. (1)

Besides the feature of Dominion disallowance we must also note briefly the position of the Lieutenant-Governor in the Canadian federal system before closing the topic of restrictions on provincial governments. The royal prerogative in the Province is

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- (1) "Disallowance is a clumsy and ineffective weapon, and it has the supreme merit that it transfers the moral responsibility of legislators by permitting them to trust to another source, the duty of satisfying themselves of the justice of what they enact, and seeks to perform a function of control which justly appertains to the electorate. Mr. Boherty's action, indeed, has clearly failed to find general approval in Canada, and it may be assumed that, in future, the Dominion government will follow the lead set by Lord Milner in 1900, when he declined to disallow the confidential legislation of Queensland. The only legitimate use of the power of disallowance seems to be in the convenience which may exist in thus disposing of an enactment ultra vires the Provinces, when inquiry might result from leaving the measure to be declared null and void by the courts." Keith: in the Journal of Comparative Legislation and International Law, October, 1921, p. 510.
- in 1921

exercised by a Lieutenant-Governor appointed for a period of five years by the Governor-General in Council and he cannot be removed except for cause assigned.⁽¹⁾ The British North America Act further provides that the Province may amend any part of its constitution except this office of Lieutenant-Governor.⁽²⁾

The fact that the British North America Act placed the power of disallowing provincial legislation and the appointment of the Provincial Lieutenant-Governor in the hands of the Governor-General in Council has led several eminent authorities to take an erroneous view as to the true nature of Canadian federalism.⁽³⁾ Some have thought that these features of the Canadian constitution made the Province a dependency of the Dominion.⁽⁴⁾ But that such is not the case is well settled.⁽⁵⁾

(1) British North America Act, 1867, Secs. 58 to 67 incl.

(2) British North America Act, 1867, Sect. 92 (1) The Initiative and Referendum Act, 6 Geo. 5, c.59, Manitoba, was held ultra vires because it affected the power of the Lieutenant-Governor to withhold his assent to any Bill passed by the legislature. In re The Initiative and Referendum Act, (1919) A.C. 935. See Canadian Law Times 354 for criticism of decision of Manitoba Court of Appeal, 27 Man. 1 (1916), which was affirmed by the Privy Council in this case. But the legislature may increase the powers and duties of the Lieutenant-Governor which are germane to his office. Attorney-General of Canada v. Attorney-General of Ontario, (1890) 20 O.R. 222, 247.

(3) Dicey: Law of the Constitution (8th ed.) pp. 163-4 (London, 1915).

(4) Teece: Constitution of Canada and Australia, p. 18 (Sydney, 1902).

(5) Per Lord Haldane in Great West Saddlery Co. v. The King (1921) A.C. 91, 100: The British North America Act "is one within the sphere allotted to them by the Act the Dominion and the Provinces are rendered on general principles co-ordinate governments."

So far as the appointment of the Lieutenant-Governor⁽¹⁾ might subordinate the province to the Dominion, Lord Watson has said in the Privy Council, "their Lordships have been unable to find either principle or authority" for the proposition "that the effect of the statute has been to sever all connection between the Crown and the Provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the Provinces to the rank of independent municipal institutions."⁽²⁾ It has been repeatedly held that the Lieutenant-Governor enjoys independently of the Dominion complete provincial executive authority.⁽³⁾ As Lord Watson further remarks: "there is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and functions except as representatives of the Crown. The act of the Governor-General and his council in making the appointment is, within the meaning of the statute, the act of the Crown;⁽⁴⁾ and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."⁽⁵⁾

(1) On the Lieutenant-Governor see Keith: Responsible Government in the Dominions, vol. II, pp. 654-664. (1912).

(2) The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, (1892) A.C. 437, 441, The Liquidators Case.

(3) Attorney-General of Ontario v. Mercer, (1883) 8 A.C. 767; The Exchange Bank of Canada v. The Queen (1885) 11 A.C. 157; St. Catherine's Milling and Lumber Co. v. The Queen (1888) 14 A.C. 46; Attorney-General of British Columbia v. Attorney-General of Canada, (1888) 14 A.C. 296, (Precious Metals Case); Attorney-General of Canada v. Attorney-General Ontario, (1898) A.C. 247, (Queen's Counsel Case); Bonanza Creek Gold Mining Co. Ltd. v. The King (1916) 1 A.C. 566.

(4) See British North America Act, 1867, Sects. 9 and 58.

(5) The Liquidators Case, *supra*, at 443.

The central appointment of the local Lieutenant-Governor is nothing more than "evidence of the federal link",⁽¹⁾ and in no substantial way derogates from local autonomy⁽²⁾ or affects the federal principle of the union.

As to the central veto power, it becomes clear on analysis that we should reach the same conclusion. Grant that the Dominion disallowance may be employed in part to accomplish the same ends as the "due process" clause of the 14th Amendment to the Constitution of the United States, the federal principle is no more impaired in Canada than it is in the United States. It may be argued, however, that the placing of a veto power in the hands of a central executive makes of Canada "a thinly veiled legislative union", but to do so is to bear down on one feature of the Act of 1867 to the exclusion of a fair interpretation of the whole. To argue thus, as Professor Kennedy points out, is to challenge the authority of provincial legislation, and to dispute the binding force of local regulations on the principle delegatus non potest delegare.⁽³⁾ In answering this argument the Judicial Committee itself has said:

"When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.

(1) See Kennedy: The Nature of Canadian Federalism, p. 17, (Toronto, 1921).

(2) It is the settled practice to appoint local men to the office.

(3) Kennedy: op. cit. p. 29-30.

"Within the limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."⁽¹⁾

On the authorities it is clear that the Dominion veto has no logical connection with the competence of the local legislature, so that whenever it is exercised it is as a matter of political expedience in the interest of the federation.⁽²⁾ And so in spite of these two features, Dominion disallowance and Dominion appointment of the Lieutenant-Governor, in the Canadian constitution, "the federal idea is clearly manifest, to reconcile national unity with the right of local self-government; the very idea that is stamped on the written constitution of the United States."⁽³⁾

✓ (1) Hodge v. The Queen (1883) 9 A.C. 117, 132. See also The Liquidators Case, supra.

(2) Referring to the British North America Act, 1867, the Judicial Committee has said: "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under control of the whole acting through the Governor-General." Bank of Toronto v. Lambe, 12 A.C. 575, 587, (1887).

(3) Clement: The Law of the Canadian Constitution (3rd ed.) p. 337. (Toronto, 1916).

C. Residuary Powers

In a comparison of the constitution of Canada with that of the United States one frequently finds the statement that in the latter "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" but in Canada "the provinces have only the powers specifically delegated while the central government retains all other authority."⁽¹⁾ But such statements so far as Canada is concerned are hardly accurate. In the Canadian constitution, as the British North America Act has been interpreted, there are no residuary powers to be reserved either to the Dominion on the one hand or to the Provinces on the other, such as there must necessarily be in the Constitution of the United States, where out of the complete gamut of powers the central government alone has had its quota enumerated. In Canada the Act has made "an elaborate distribution of the whole field of legislative authority between two legislative bodies."⁽²⁾ In Canada there are two classes of enumerated powers, the Dominion and the Provincial; in the United States there is only one, the Federal.⁽³⁾

(1) Wrong: The United States and Canada, p. 120 (New York, 1921). See also Keith: Notes on Imperial Constitutional Law in the Journal of Comparative Legislation and International Law, October, 1921, p. 309; Bryce: Canada: An Actual Democracy, p. 5 (Toronto, 1921).

(2) Bank of Toronto v. Lambe (1887) 12 A.C. 575, 587.

(3) On account of this dual enumeration of powers and the feature of Dominion disallowance American constitutional decisions have not been in point in interpreting the British North America Act, 1867. See Remarks of Lord Hobhouse in Bank of Toronto v. Lambe (1887) 12 A.C. 575, 587, when counsel advanced the doctrine of McCulloch v. Maryland, 4 Wheaton 436, and Osborn v. United States Bank, 9 Wheaton 738.

Section 91 of the Act before enumerating "for greater certainty", those subjects over which the Dominion government shall have "exclusive legislative authority", provides that the central Parliament shall "make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." It is this clause which is usually taken to place residuary powers in the hands of the federal authorities. But on turning to section 92 wherein are enumerated those subjects over which the Provincial Legislature has exclusive control, it will be found that the last sub-section No. 16 reads: "Generally all matters of a merely local or private nature in the Province." In considering the force of this section Lord Watson said in the Ontario Liquor License Act Case⁽¹⁾ that it appeared:

"to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in S. 91. It assigns to the Provincial Legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated."

Although the "peace, order, and good government clause" is residuary in form yet Lord Watson also stated in the same case that:

(1) Attorney-General for Ontario v. Attorney-General for Canada (1896) A.C. 348 (Liquor License Act or Local Prohibition Case.)

"the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in S. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to touch upon provincial legislation with respect to any of the classes of subjects enumerated in S. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by Sect. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the Provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each Province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in S. 92 upon which it might not legislate, to the exclusion of the Provincial legislatures." But "their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

As this interpretation has been consistently followed in subsequent cases⁽¹⁾ before the Judicial Committee, it must be taken as settled "that the use of the word residuum as indicating any real principle of distribution as between federal and provincial jurisdiction is entirely out of place under the British North America Act."⁽²⁾

In this brief summary of the relation of the Provincial to the Dominion government in Canada, it is manifest that "what-

(1) Attorney-General of Manitoba v. Manitoba License Holders' Association (1902) A.C. 73, City of Montreal v. Montreal Street Railway (1912) A.C. 333, Attorney-General for Canada v. Attorney-General for Alberta (1915) A.C. 588.

(2) Clement: The Law of the Canadian Constitution, p. 453, (Toronto, 1916). See also Lefroy: Short Treatise on Canadian Constitutional Law, p. 74, (Toronto, 1918).

ever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act."(1) The division of powers between the local and central governments has been interpreted as being on true federal lines, neither government being the delegate of the other, but each enjoying autonomy within the realm of its authority, the Dominion government having assigned to it all matters of common Canadian concern, the Provincial government all matters of local concern. Dominion disallowance, we submit, is an anomaly which, however, in essence and present practice does not mar the federal fabric. The advantages accruing to the Dominion from its use on occasions when local action threatened the welfare of the Union have well off-set its employment at times in violation of the federal principle embodied in the act as a whole. Dominion disallowance is to be brooked on the grounds of expediency,⁽²⁾ and the use of such a veto power will no doubt with time become clothed with a convention of the constitution as has the Royal veto in the United Kingdom.

(1) Attorney-General of Ontario v. Attorney-General of Canada (1912) A.C. 571, 584.

(2) An Act of Nova Scotia in 1921 changing the rule of the road from left to right was disallowed until New Brunswick should also conform to the rest of the continent. Such an act went into effect in New Brunswick on December 1, 1922.

II. THE RELATION OF THE DOMINION AND PROVINCIAL GOVERNMENTS TO THE IMPERIAL GOVERNMENT

What is the relation of Canada to the constitution of the mother country, or, to put the question in what is now the more correct form, what is Canada's status in the constitution of the British Commonwealth? Is Canada a nation? To ask such a question is to open up a discussion which at once throws us back to a scrutiny of definitions, a review of historical developments, and a study of changing constitutional conventions within the British Empire, all of which is beyond our present scope. Even if we were to indulge in such a discussion it is doubtful indeed if a definite answer could be reached at the present time when there is so much conflicting opinion within an Empire whose constitution depends largely on the current of thought and understanding. During the debate on the Irish treaty before the House of Commons in December, 1921, Mr. Lloyd George admitted that dominion status was practically impossible of definition and added that therein lay the secret of its success and smooth working. A logical development of international law has on occasion to give way to statesmanship. No one puts this into practice more often than those in control of the internal and external relations of the British Commonwealth, as witness the arrangement for a Canadian Minister at Washington.⁽¹⁾

(1) Keith: War Government in the Dominions, pp. 172-176, (Oxford, 1921).

Foreign observers are apt to judge the demand and attainment of a large sphere of home rule and its concomitants by the self-governing dominions as being the evidence of an effort to throw off completely the Imperial yoke. But such is not the case.⁽¹⁾ Any advance toward complete autonomy is only the result of a move to further their economic and political interests with British and foreign communities.⁽²⁾ No self-governing dominion is so shortsighted as to forego the advantages of Imperial unity by a declaration of independence. The self-governing dominions of the British Commonwealth of Nations, therefore, fall short of complete nationhood to-day by just that amount of curtailment of their freedom which is felt by the Imperial and Colonial statesmen to be requisite to the economic and political interests of the Empire as a whole.⁽³⁾ These statesmen now fully appreciate that a more specific definition would seriously embarrass them in the solution of those problems of Empire which the future still has in store.

(1) Rowell: The British Empire and World Peace, p. 173, (Toronto, 1922).

(2) Rowell: op. cit. pp. 182-186. Borden: Canadian Constitutional Studies, pp. 126-128, (Toronto, 1922).

(3) Lewis: The International Status of the British Self-Governing Dominions, in the British Year Book of International Law, 1922-1923, p. 21, (London, 1922), is an excellent concise review of the subject. See also Eastwood: The Organization of a Britannic Partnership, chaps. IV and V. (London, 1922); Keith: Dominion Home Rule in Practice (Oxford, 1921); and Hall: The British Commonwealth of Nations (London, 1920).

But in spite of the indefiniteness of Canada's standing both in the constitution of the Empire and in international law, she still has some very definite points of contact with the United Kingdom which affect the main object of our enquiry. To these we now turn our attention.

A. Imperial Legislation

It must not be forgotten that Canada's federal system takes its legal basis from a statute of the Parliament which sits in London. This Parliament is the sovereign authority of the Empire.⁽¹⁾ It may have granted legislative power to the self-government dominions but yet any enactment of these local governments is null and void to the extent to which it is repugnant to acts passed for the Empire by the Imperial Parliament.⁽²⁾ As a Canadian judge has said:

"The supremacy of the Parliament of the United Kingdom of Great Britain and Ireland is not questioned by anyone. All powers exercisable by the Parliament of Canada or by the legislature of any province of Canada are subject to the sovereign authority of that Parliament."⁽³⁾

What, then, is the range of authority permitted Canada by the British North America Act? How far does other Imperial Legislation operate in Canada?

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- * (1) Routledge v. Low, L.R. 3, E. & I. App. 113 (1868); Callender, Sykes & Coy. v. Colonial Secretary of Lagos, (1891) A.C. 460, 466; Regina v. College of Physicians, 44 U.C.Q.B. 564 (1879).
- (2) The Colonial Laws Validity Act, 1865, 28 & 29 Vic. C. 63 (Imperial), was passed to remove all doubt as to this principle in the constitution of the Empire.
- (3) Algoma Central Rly. Co. v. The King, 7 Ex. Ct. R. 239, 253 (1901), reversed in (1903) A.C. 478, but no doubt was expressed on the principle of the quotation from Mr. Justice Burbidge.

(i) The British North America Act, 1867.a. Objective Range of Legislative Power.

As the authority of the Dominion or a Provincial Legislature in Canada springs from a statute, it is evident, in the oft quoted language of the Privy Council, that the powers of a Canadian government are "expressly limited by the act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers."⁽¹⁾ We have already referred to the comprehensiveness of the grant made by the Act. The Dominion Government is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects.... assigned exclusively to the legislatures of the Provinces,"⁽²⁾ those subjects assigned to the latter being "generally all matters of a merely local or private nature in the Province."⁽³⁾ There can be no doubt," said Earl Loreburn in The Supreme Court Reference Case before the Privy Council, "that the powers distributed between the Dominion on the one hand and the Provinces on the other cover the whole area of self-government within the whole area of Canada. It would be subversive of the whole scheme and policy of the Act to assume that any point of internal self-

(1) Regina v. Burah, 3 A.C. 889, 904 (1878).

(2) British North America Act, 1867, Sec. 91.

(3) Ibid, Sec. 92 (16). See Hamilton, Grimsby, and Beamsville Railway Co. v. Attorney-General for Ontario (1916) 2 A.C. 583.

(4) Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571, 581 (Supreme Court Reference Case).

government was withheld from Canada."

In the Supreme Court Reference Case, 1912, the question raised was whether it was in the power of the Dominion government to pass an act authorizing the Governor-General in Council to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact, and also within the power of the Provincial Governments to pass similar acts requiring their own courts to answer questions put by the Provincial executives. Although no authority for enactments of this nature was found within the Act, yet the legislation in question was held valid. Earl Loreburn said, "In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids.... Again, if the text says nothing expressly, then it is not to be presumed that the constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense." (1)

In this and many other opinions the Judicial Committee has proved to be the guardian of the genius of British institutions that have been set up and developed throughout the

(1). Attorney-General for Ontario v. Attorney-General for Canada
(1912) A.C. 571, 581 (Supreme Court Reference Case.)

Empire. Then again it is well settled that the British North America Act, "conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament." The Dominion Government is not a delegate,⁽¹⁾ nor is the Provincial Government.⁽²⁾ They, therefore, have no constitutional difficulty in delegating to commissions and municipal bodies the power to make regulations and by-laws which they themselves could exercise.⁽³⁾ And since the legislatures are not delegates there is no one but the local electorates to question the discretion with which they carry out their authority under the provisions of the British North America Act.⁽⁴⁾ Delegation, however, which amounted to abdication would raise a serious constitutional question; for as Viscount Haldane said in the Initiative and Referendum Case, a Provincial legislature cannot "create and endow with its own capacity a new legislative power not created by the act to which it owes its own existence."⁽⁵⁾

R. v. Burch.

To sum up: The objective range of legislative authority in any of the Canadian governments is controlled by the British North America Act and those governments have no powers which

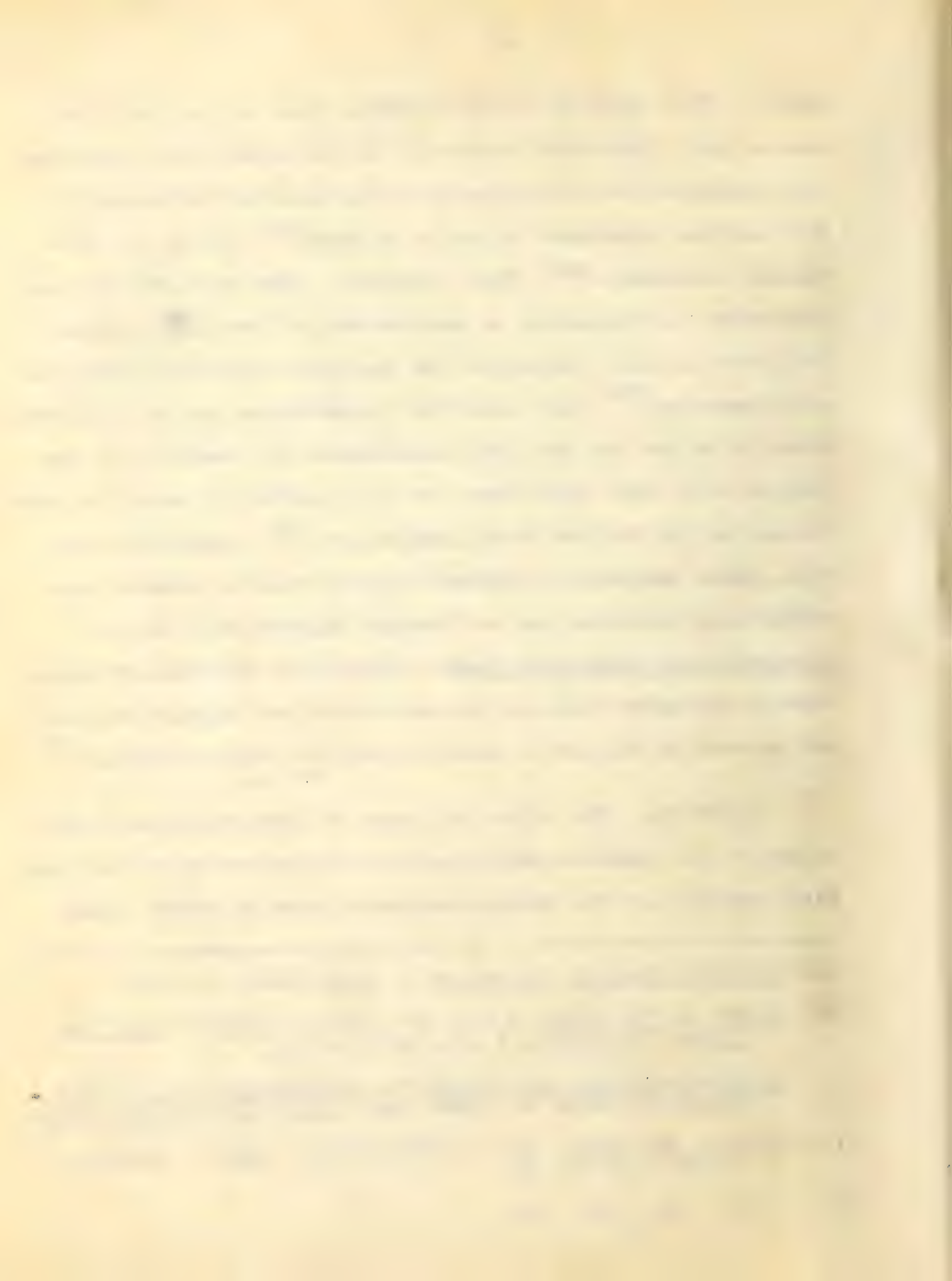
(1) Attorney-General for Canada v. Cain (1906) A.C. 542.

(2) Hodge v. The Queen, 9 A.C. 117 (1883); Dobie v. The Temperalities Board, 7 A.C. 136 (1882).

(3) Attorney-General for Ontario v. Attorney-General for the Dominion (1896) A.C. 348, 364 (Liquor License Act Case).

(4) Riel v. The Queen, 10 A.C. 675, (1885); Webb v. Ontario (1897) A.C. 81, 86.

(5) (1919) A.C. 935, 945.



are not expressly or impliedly granted by that act.⁽¹⁾ The ambit of these powers, however, is interpreted as being co-extensive with the function of self-government within an Empire.

b. Territorial Range of Legislative Power

Whether the Canadian government can enact legislation which shall operate outside its territory is of such slight relevance to our present topic and is, in fact, so unsettled on the authorities both lay and judicial, that we merely indicate the present trend of thought on the question.

In the case of Macleod v. The Attorney-General for New South Wales⁽²⁾ The Privy Council indicated that it "was a well-known and well considered limitation" that a new colony could only legislate for those actually within its jurisdiction and that any effort to enlarge their jurisdiction "would be inconsistent with the powers committed to a colony."⁽³⁾ But the case of The Attorney-General for Canada v. Cain⁽⁴⁾ has since adopted a more liberal view. In that case an Act of the Canadian Parliament authorizing the arrest and deportation by sea of prohibited immigrants was held to be a valid exercise of colonial legislative authority. Their Lordships said that in view of the plenary authority given to the Dominion Government in the British North America Act they had the "power to impose that extra-territorial constraint which is necessary to enable

(1) Rex v. Crewe, 2 K.B. 576, 612-13 (1910).

(2) (1891) A.C. 455.

(3) Of course Canada could keep an alien from coming into the country. Musgrove v. Chung Teeong Toy (1891) A.C. 272.

(4) (1906) A.C. 542.

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CHAPTER I. GENERAL PRINCIPLES

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The fourth part of the book is devoted to a
detailed study of the properties of the

them to expel those aliens from their borders to the same extent as the Imperial government could itself have imposed the constraint for a similar purpose had the statute never been passed."⁽¹⁾ Indeed Sir John Salmond contends that there "is no genuine rule of substantive constitutional law which prevents a colonial legislature from enacting such extra-territorial prohibitions or authorizations as may be required for the peace, order, and good government of the enactments of the Imperial Parliament."⁽²⁾ But as the question is still largely in doubt⁽³⁾ Canada has now on foot an effort to have an amendment added to the British North America Act which will embody this principle.⁽⁴⁾ It is obvious that the doctrine of extraterritoriality raises some of the most delicate problems with respect to Canada's imperial and international status.

As to the Provincial governments there is more certainty on the question of the territorial range of their enactments. This is due in part to the circumstance of their being members

(1) (1906) A.C. at 547.

(2) Salmond: The Limitations of Colonial Legislative Power in 33 Law Quarterly Review, 117 (1917).

(3) See Clement: The Law of the Canadian Constitution, pp. 65-115 (Toronto, 1916); Lefroy: Short Treatise on Canadian Constitutional Law, pp. 79-80, and footnotes (Toronto, 1918); Keith: Responsible Government in the Dominions, I, 372-401 (Oxford, 1912).

(4) For the problems which such an amendment would raise, see Keith: Extra-Territorial Legislation in Journal of Comparative Legislation and International Law, 3rd Ser., III, 132 (1921).

of the federal union⁽¹⁾ but mainly to the explicitness with which their powers are defined in the British North America Act. Section 92 of the Act is carefully drafted with the limitation of "Provincial", "in the Province", added to each subject which is assigned to the local legislature for its exclusive jurisdiction. That the territorial range of provincial legislative authority, therefore, cannot go beyond its geographical area is a matter of statutory limitation. No province can pass laws to operate outside its own territory,⁽²⁾ and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions.⁽³⁾ Provincial territory is taken to include bays and bodies of water inter fauces terrae.⁽⁴⁾ Public harbours, however, are the property of the Dominion Government under the British North America Act.⁽⁵⁾

(1) When a field of legislation is within the competence both of the Dominion and the Provincial legislatures and both have legislated, the Dominion act must prevail. La Compagnie d'Éclairage de St. Francis v. Continental Heat and Light Co. (1909) A.C. 194.

(2) Woodruff v. Attorney-General for Ontario (1908) A.C. 508; Royal Bank of Canada v. The King (1913) A.C. 293; but see Bank of Toronto v. Lambe (1887) 12 A.C. 575; Workmen's Compensation Board v. Canadian Pacific Ry. Co. (1920) A.C. 184. In the last case Viscount Falden uses the expression, "Subject of a Province" at p. 191.

(3) Deacon v. Chadwick (1901) 1 Ont. L.R. 346; Ex parte Ali (1920) 1 W.W.R. 661 (Alberta). The Administration of Justice Act, 1920, 10 and 11 Geo. 5, C.81, secs. 9-14, provides for the reciprocal enforcement of judgments in the United Kingdom and other parts of the British Dominions and that jurisdiction may be taken over by a non-resident doing business within the territory of the court provided the process employed could reasonably be calculated to give notice.

(4) Rex v. Meikleham (1905), 11 Ont. L.R. 366.

(5) British North America Act, 1867, Sect. 108 and Schedule 3. See Attorney-General for Canada v. Attorney-General for Ontario, Quebec and Nova Scotia (1898) A.C. 700. As to when a harbour becomes a public harbour, see Attorney-General for Canada v. Ritchie Contracting and Supply Co. Ltd. (1919) A.C. 999.



c. Constituent Range of Legislative Power

Canada is the only one of the self-governing dominions that is denied the power to alter by herself the essential features of the Dominion Constitution⁽¹⁾. The British North America Act permits the Provinces to amend their constitutions excepting the office of Lieutenant-Governor,⁽²⁾ but is silent as to a similar power in the federal government. It is difficult, therefore, to imply any such power from the "peace, order, and good government" clause. That clause, as Lord Loreburn said during the argument of the Supreme Court References Case⁽³⁾ does not "involve the faculty of re-writing the whole constitution."⁽⁴⁾

There is no doubt that the Imperial Parliament would grant Canada the same authority to amend its constitution as obtains in the other dominions provided that Federal and Provincial governments could agree to such an alteration of the British North America Act. However, Quebec alone will not sanction the step, fearing that it might lead to undermining the security of the French language and the Roman Catholic religion which the Act in its present form guarantees,⁽⁵⁾ and the Imperial Parliament

(1) See Eastwood: The Organization of a Britannic Partnership, p. 45-6 (Manchester, 1922) for a brief description of how constitutional amendments are secured by the other Dominions.

(2) British North America Act, 1867, sec. 92 (1).

(3) (1912) A.C. 571.

(4) See Lefroy: Short Treatise on Canadian Constitutional Law, 176, fn 75 (Toronto, 1918).

(5) British North America Act, 1867, secs. 93, 133.

is unwilling to open the door even to the possibility of an impairment of the concessions made to Quebec in 1867. But whenever all Canadian parties concerned have desired amending enactments the Imperial Parliament has never hesitated to pass them,⁽¹⁾ so that Canada's constituent range of legislative authority is in substance as broad as that of any of the other dominions.⁽²⁾

As to the constituent range of authority in the Provinces we have seen that they are only limited by the Act of 1867 in one respect, namely, their power to change the federal link, the office of the Lieutenant-Governor.⁽³⁾ Although this limitation "does not inhibit a statutory increase of duties germane to the office",⁽⁴⁾ it has been found by the Judicial Committee to present an impediment to the adoption of the Manitoba Initiative and Referendum Act⁽⁵⁾ of 1916. They held that the Act in ques-

(1) The following amendments have been made to the British North America Act of 1867: (1871) 34 and 35 Vict., c. 28; to permit the Canadian Parliament to establish new provinces from its territories; (1875) 38 and 39 Vict. c. 38; to permit the Canadian Parliament to define its privileges, immunities and powers other than legislative; (1886) 49 and 50 Vict., 35; to fix the representation of the territories in Parliament; (1907) 7 Edw. 7, c. 11; to reapportion the subsidies to the Provinces; (1916) 5 and 6 Geo. 5, c. 45; to alter the Constitution of the Senate; (1916) 5 and 7 Geo. 5, c. 19; to prolong the life of Parliament for a year.

(2) See Dicey: Law of the Constitution, p. 106 fu. (8th ed. London, 1915).

(3) British North America Act, 1867, sec. 92 (1).

(4) Attorney-General of Canada v. Attorney-General of Ontario, (1890) 20 Ont. Rep. 222, 247.

(5) 6 Geo. 5, c. 59 (Manitoba).

tion under certain circumstances required a proposed law to be submitted to a body of voters totally distinct from the legislature of which the Lieutenant-Governor was the constitutional head, and that as he was rendered powerless to prevent such a law from being put on the statute books if approved by a majority of those voters, it was invalid.⁽¹⁾ Lord Haldane said that the British North America Act "intrusts the legislative power in a province to its legislature, and to that legislature only." He added, however, that there was no doubt that the legislature may seek the aid of subordinate agencies, but for it "to create and endow with its own capacity a new legislative power not created by the act to which it owes its own existence" raised a grave constitutional question. We shall postpone a further enquiry on this question until we discuss in full the topic of legislative delegation. Suffice it to say for the moment that while the Judicial Committee were able to put their decision on the technical ground that the Act in question interfered with the office of Lieutenant-Governor, yet what seems to have influenced them more was that there was too wholesale a delegation of legislative power in a community where the British principle of the supremacy of Parliament might be supposed to obtain. In view also of the

(1) In re The Initiative and Referendum Act (1919) A.C. 935 affirming decision of Court of Appeals of Manitoba in 27 Man. L.R. 1: which was criticised in 37 Canadian Law Times, 334, (1917). The Judicial Committee deprecated the fact that the Supreme Court of Canada had not been given an opportunity to pass on the question.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a pale, hazy blue. The air was crisp and clean, a welcome change from the stuffy atmosphere of the car. I took a deep breath, feeling the cool air fill my lungs. The sun was just beginning to rise, casting a soft, golden glow over the landscape. The trees were bare, their branches reaching out like skeletal fingers against the sky. The ground was covered in a thin layer of frost, glistening in the early morning light. I walked slowly, my boots crunching on the ice. The silence was profound, broken only by the occasional rustle of leaves or the distant call of a bird. I felt a sense of peace and solitude, a moment of quiet reflection in the midst of a new day. The world was still so quiet, so still. I could hear the faint hum of the car engine as it started to move. The road ahead was straight and clear, leading me into the distance. I felt a sense of purpose, a drive to go on. The cold was no longer a nuisance, but a challenge. I was ready for it. I was ready for everything.

The sun was higher now, its rays warming my face. The frost had melted in some places, leaving puddles that reflected the light. The trees were still bare, but their silhouettes were more defined against the brightening sky. I continued to walk, my pace steady and firm. The world was beginning to wake up, and I was part of it. I felt a sense of hope, a belief that everything would be alright. The cold was just a temporary obstacle, one that I could overcome. I was strong, I was resilient. I was ready for whatever came my way. The road ahead was long, but I was determined to see it through. I was determined to make it.

peculiar merits of Parliamentary government in its responsiveness to popular control and of the questionable advantages of the initiative and referendum, we submit, that the decision of their Lordships was a wise stroke of statesmanship. Nevertheless, if a more carefully drafted Initiative and Referendum Act were to come before the Privy Council, there is every reason to believe that they would hold it intra vires. There was evidence of this in the recent decision of The King v. Nat Bell Liquors Ltd.⁽¹⁾ In that case the respondent had been convicted under an Alberta statute, which had been passed by the legislature and assented to by the Lieutenant-Governor by virtue of a mandate secured through the initiative under a local Direct Legislation Act.⁽²⁾ Unfortunately the incompetency of the legislature under such circumstances was not raised in the argument, nor was the effect of the popular mandate upon the assent of the Lieutenant-Governor considered. The Board said, however, that there was no reason to impugn a statute duly enacted under such circumstances. They took the force of the initiative to be little different from that of any other expression of the will of the majority of the electorate and that it would be absurd to hold a statute invalid because passed pursuant to a mandate ascertained in a novel way. They added further that when the British North America Act said that "in each province the legislature may exclusively

(1) (1922) 2 A.C. 128.

(2) (1913) 4 Geo. 5, c. 3 (Alberta.)

make laws in relation to matters coming within the classes of subjects"⁽¹⁾ enumerated, that it was to be taken to mean exclusively of any other legislature and not of any other volition than that of the legislature itself. It would seem, therefore, ~~that~~ as if the Judicial Committee were prepared to abate somewhat the force of their decision in the Manitoba Case and to permit a restriction of the veto of the Lieutenant-Governor. There is really very little danger in the initiative and referendum legislation becoming a source of danger to the federal principle in Canada for no such act could possibly be intra vires if it denied the Dominion power of disallowance.

The attitude of the Privy Council in the Nat Bell Liquors Case follows from the stand taken in the prior case of McCawley v. The King⁽²⁾ on appeal from Australia. Speaking of the legislative authority granted to the colonies, the Board said: "Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation." Accordingly where the Imperial Parliament had permitted the Colonial government within limits dictated by the exigency of Imperial control to draft its own constitution and to reduce it to a written document, the Privy

(1) Sec. 92.

(2) (1920) A.C. 691.

Council held nevertheless that such constitutions were not to be considered the supreme law of the land. They were flexible and not rigid constitutions. Where as in McCawley v. The King an act was passed which was inconsistent with the written constitution of Queensland but yet within the authority vouchsafed her by the Imperial Parliament, the Judicial Committee held that to that extent the constitution had been modified and a special amendatory process was not necessary.

(ii) Other Imperial Legislation

Imperial legislation, apart from the British North America Act, which is in force in Canada may be roughly divided into that which existed before and that which existed after the foundation or conquest of those colonies which went to make up the Dominion. As to the British statute law which existed prior to such time, all but the Provinces of Nova Scotia, Prince Edward Island, and New Brunswick, have stipulated by special enactment the extent to which it was to be followed in so far as they were authorized so to prescribe. In the Maritime Provinces there is no statute and it has been for the courts to decide whether such Imperial legislation is to be followed. In general, "British statutes have been denied operative force in Nova Scotia unless clearly applicable, while in New Brunswick the tendency at least of the early authorities, seems to have been not to reject them

unless clearly applicable."⁽¹⁾ In Quebec by statute⁽²⁾ the English criminal law was put in force but as to property and civil rights the Privy Council has interpreted the act to mean that "the French law as it existed at the time of the session of Canada, and not the English law" was to ~~remain~~.⁽³⁾

As to Imperial enactments down to 1865 the courts enforced the rule of construction to the effect that all British legislation was prima facie for the United Kingdom⁽⁴⁾ and that it did not apply to a colony unless "made applicable to such colony by the express words or necessary intendment." In 1865 the Colonial Laws Validity Act⁽⁵⁾ was passed and this rule expressly enunciated. The act further provided that any colonial law repugnant to an Imperial Act or regulation extending to the colony should to that extent be void but in that extent only.⁽⁶⁾ It is this act, therefore, which controls the force of Imperial legislation so far as the colonies are concerned. But judicial interpretation also plays its part. Not only do the words "necessary intendment" in that Act call for interpretation which affects the law of the

(1) Clement: The Law of the Canadian Constitution, p. 282 (Toronto), 1916. The general subject of English Law Introduction is covered in his Chapter XIV.

(2) Quebec Act, 1774, 14 Geo. 3, c. 83, s. 8.

(3) The Citizens Insurance Co. v. Parsons (1881) 7 A.C. 98, 110.

(4) Routledge v. Low (1868) L.R. 3 E and I App. 100, 113.

(5) 29 and 30 Vict., c. 63 (Imperial).

(6) Ibid, Secs. 2 and 3.

colonies⁽¹⁾ but the word "exclusive" with reference to legislative authority of the Canadian governments under the British North America Act itself require judicial examination. The latter has been repeatedly held not to mean exclusive of Imperial legislation.⁽²⁾ Such a construction necessarily follows from the doctrine of the paramountcy of the Imperial Parliament.

But although no one questions the paramountcy of the British Parliament, it does not follow that laws are being passed which interfere with the internal government of the Dominions against their wishes. British colonial policy has gradually developed a convention of what may be called the constitution of the Empire⁽³⁾ and to-day any piece of legislation intended to apply in the colonies would in the great majority of cases contain a clause to the effect that the act was not to extend to a self-governing dominion unless declared by the legislature of that Dominion to be so in force.⁽⁴⁾

(1) See Callender Sykes and Co. v. Colonial Secretary of Lagos (1891) A.C. 460, 466-7; New Zealand Loan and Mercantile Co. v. Morrison (1898) A.C. 349, 357-8.

(2) Augers v. Queen Insurance Co. (1880) 16 Can. L.J. 198, 204; Smiles v. Belford (1879) 1 Ont. A.R. 442, 447-8; Tai Sing v. Maguire (1878) 1 B.C. (pt. 1) 101, 107.

(3) Haldane: The Constitution of the Empire and the Development of its Councils in Journal of the Society of Comparative Legislation and International Law, N.S. No. IX, p. 11 (London, 1902); Lewis: The International Status of the British Self-Governing Dominions, in British Year Book of International Law, 1922-23, p. 21, (London, 1922).

(4) See Imperial Copyright Act, 1911, 1 and 2 Geo. 5, c. 46, s. 26. Keith believes the time ripe for abrogation of the idea of the supremacy of Imperial legislation. See The Canadian Constitution and External Relations in The Journal of Comparative Legislation and Inter-3d ser., vol. 1, part 1, p. 7, 10-11 (1919).

There is, however, a large field in which the Imperial Parliament still performs one indispensable function for a commonwealth of nations that desire to act as a unit. This is in "the carrying out of foreign policy and treaty obligations, or other matters of internal interest in which either uniformity or extra-territorial application is required."⁽¹⁾ Thus, acts with respect to succession to the Crown, naturalization, extradition of fugitive offenders, merchant shipping, appeals to the King in Council, reciprocal enforcements of judgments in the courts of various colonies, the army, navy, and colonial defence generally,⁽²⁾ are still within the purview of the central parliament of the Empire.⁽³⁾ Again the colonial legislatures benefit from the validity which the Imperial Parliament can stamp ex post facto any doubtful local legislation. Thus an Act of 1871 established the validity of the Canadian legislation of 1869 and 1870 respecting the administration of the Northwest Territory and Manitoba upon which doubt had been cast. Disputed boundary lines between colonies will also be settled or ratified ex post facto as the situation demands. The Imperial Parliament alone has the authority to legislate on such matters.

(1) Keith: Responsible Government in the Dominions, III, 1316, (Oxford, 1912).

(2) Borden: Canadian Constitutional Studies, pp. 97-103, (Toronto, 1912).

(3) See Clement: op.cit. Chap. IX to XIII incl.

B. The Crown

Having seen to what extent the Crown in Parliament is the supreme legislative authority for the Empire, we now turn to consider briefly the position of the Crown in its Executive capacity. The key to this position is to be found in the oath which the Sovereign takes on coronation: "to govern the people of this United Kingdom of Great Britain and Ireland and the Dominions thereto belonging according to the statutes in Parliament agreed on and the respective laws and customs of the same." The Crown, therefore, is one and indivisible throughout the Empire⁽¹⁾ and not only takes part in their law-making, but is the highest and ultimate source of all executive authority in the self-governing Dominions.⁽²⁾ The prerogatives of the Sovereign obtain in Canada as in the United Kingdom except where limited by Imperial statutes or local law validly enacted, and the customs of the constitution.⁽³⁾

The effect of these general and well settled principles will now be considered more extensively in so far as Canada is concerned.

(1) Williams v. Howarth, (1905) A.C. 551.

(2) British North America Act, 1867, sec. 9.

(3) Re Lord Bishop of Natal (1865) 3 Moo. P.C. (N.S. 148);
Commercial Cable Co. v. Newfoundland (1916) 2 A.C. 610.

(i) Foreign Relations

The extent to which the Crown through one of its Imperial Ministers may alone negotiate treaties for the self-governing dominions is at present a subject of warm debate among colonial statesmen. Certain it is, however, that no treaty, in whatever way negotiated, which "involves either a charge on the people or a change in the law of the land" can be carried into effect without Parliamentary sanction.⁽¹⁾ It may now be considered established as a convention of the constitution of the Commonwealth that any treaty affecting such interests in the self-governing Dominion will not be binding therein without its first being adopted by the local government before ratification by the Crown. Once a treaty is ratified, the Federal Government in Canada has, under the British North America Act, 1867, the authority to provide the necessary legislation and machinery to carry out its measures for the Dominion as a whole.⁽²⁾ By constitutional practice the Dominion authorities will not sanction a treaty without the consent of the provinces where the subject matter is such as to fall within the exclusive jurisdiction of the Provincial government.⁽³⁾ Once adopted, the treaty is binding on the provinces and any legislation repugnant to it is inoperative.⁽⁴⁾

(1) Anson: Law and Custom of the Constitution, 2nd ed. Pt. II, p. 297 (Oxford, 1896). On Canada's freedom to negotiate commercial treaties see Porritt: Fiscal and Diplomatic Freedom of the British Overseas Dominions, p. 198. (Oxford, 1922).

(2) British North America Act, 1867, sec. 132.

(3) Keith: Responsible Government in the Dominions, III, p. 1122 (Oxford, 1912).

(4) In re Nakane and Okazoka (1908) 13 B.C. 370; In re The Japanese Treaty Act of 1913 (1920) 56 D.L.R. 69.

Should the Imperial Parliament under the growing constitutional practice incorporate in a treaty a proviso that it was not to affect the self-governing dominions until adopted by them, it is to be observed that the Crown on advice of its Imperial ministers may still resort to the power of disallowance to prevent any legislation repugnant to the treaty.

(ii) Disallowance

All bills passed by the Dominion legislature and assented to by the Governor-General in the King's name are forwarded to the Secretary of State for the Colonies in London. The British North America Act provides that within two years from the receipt of any bill the King in council may, if he sees fit, disallow it, such disallowance to take effect on the date of signification being made through the Governor-General to the Houses of Parliament in Ottawa.⁽¹⁾ Only one such Act has been voided in this way. It was passed in 1873 and was disallowed on the ground that it was ultra vires and not for reasons of Imperial policy. In 1875 an amendment to the British North America Act was secured which covered the matter in question.⁽²⁾ The power of disallowance by the King in Council has, however, been smothered by a convention of the constitution and to-day its force as an instrument of control over the self-governing may be said to be dead.

(1) Sec. 56.

(2) Keith: Responsible Government in the Dominions, II, p. 1031. (Oxford, 1912).

Closely allied with the Imperial disallowance is the power in a Governor-General to withhold his assent to a bill following instructions from the Crown⁽¹⁾ or to reserve a bill "for the signification of the Queen's pleasure",⁽²⁾ Here again a convention of the constitution controls. Bills affecting matters of Imperial concern are saved from being reserved by prior negotiation and understanding with the Imperial authorities. Inter-Imperial liaison has thrown the veto power of the Crown into desuetude.

(1) British North America Act, 1867, sec. 55.

(2) Ibid., sec. 57.

(iii) Appeals to the Crown in Council

The ancient right to petition the King in Council for justice which was denied to his subjects in England by the statute which abolished the Star Chamber in 1641, survives to His Majesty's subjects beyond the seas.⁽¹⁾ This prerogative to hear such appeals has never been doubted.⁽²⁾ But the Act establishing the Judicial Committee in 1833⁽³⁾ placed the matter on a statutory basis and nothing but subsequent Imperial legislation is competent to curtail this right of appeal.⁽⁴⁾ By the Act of 1844⁽⁵⁾ provision was made for representation on this Judicial Committee of self-governing Dominions and also India since the Board hears appeals from the latter dependency as well. Appeals may be taken from any court in Canada but the Judicial Committee will not generally grant leave except when it comes from the higher court in each

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- (1) See Eastwood: The Organization of a Britannic Partnership, p. 136 (Manchester, 1922).
- (2) Cushing v. Dupuy (1880) 5 A.C. 409; Canadian Pacific Ry. Co. v. Toronto (1911) A.C. 461.
- (3) 3 and 4 Wm. IV, c. 41.
- (4) Keith: op.cit. III, p. 1356-7. This point seems clear enough on general principles but the authorities are strangely at variance. See Clement: The Law of the Canadian Constitution, pp. 157-164 (1916); Cameron: The Canadian Constitution, and The Judicial Committee, pp. 25-50 (1915); Lefroy: (1918). On the reference of questions other than appeals to the Judicial Committee by the Crown, see 50 Canadian Law Journal, 381, (1914); By sec. 4 of 3 and 4 Wm. IV, c. 41, the Crown may submit questions to the Judicial Committee for their opinion and in this way the Board passed upon the questions stated in the Queen's Counsel Case (1898) A.C. 247, The Fisheries Case (1898) A.C. 700, and others. But the Committee is loath to pass on such hypothetical questions. See their remarks in Attorney-General for British Columbia v. Attorney-General for Canada (1914) A.C. 153, 162.
- (5) 7 and 8 Vict. c. 69.

province or from the Supreme Court of Canada.⁽¹⁾ Their Lordships are also disinclined to grant appeals in criminal cases.⁽²⁾ The right no doubt remains in spite of local statutes to the contrary,⁽³⁾ but they will not interfere unless "by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done."⁽⁴⁾ A code of rules instituted by an order in council lays down for the majority of the Provinces when appeals shall lie of right.⁽⁵⁾ In all other cases appeals lie by special leave as an act of grace, provided the lower courts have exercised the ordinary jurisdiction of courts of justice⁽⁶⁾ and have not been passing on

- (1) Where a suitor having his choice whether to appeal to the Supreme Court or to the Crown, elects the former remedy, it is not the practice to give him special leave except in a very strong case. Ex parte Clergue (1903) A.C. 521.
- (2) Arnold v. The King Emperor, 1914, A.C. 644. At p. 646 Lord Shaw says: "If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal the Royal prerogative of review on Judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions."
- (3) R.S. Can., c. 146, sec. 1025. For the effect of attempt of this statute to limit appeals, see Toronto Ry. Co. v. The King (1917) A.C. 530.
- (4) In re Dillet (1887) 12 A.C. 459, 467. See also Ex parte Deeming (1892) A.C. 422.
- (5) See 45 Canadian Law Journal 102, and 186 (1909); 46 Ibid 158; 48 Ibid 159; Admiralty appeals only lie as of right from the Supreme Court of Canada. Colonial Courts of Admiralty Act (Imperial), 53 and 54 Vict., c. 27; Richelieu and Ontario Navigation Co. v. S.S. Cape Breton (1907) A.C. 112.
- (6) Thus where an Ontario statute provided that the decision of the Supreme Court of the Province should be final on any appeal from a finding of the Railway and Municipal Board, the Crown nevertheless granted special leave to appeal in Toronto Ry. Co. v. Toronto (1920) A.C. 446.

such matters as election petitions⁽¹⁾ or conflicting claims to Crown grants⁽²⁾ which have been assigned to them by local statutes.⁽³⁾ The Judicial Committee has adopted the salutary practice of not making public any dissenting opinions.⁽⁴⁾ Only one opinion is delivered on behalf of the Board. It may overrule its prior decisions, but generally does not do so if any rights of property are evolved.⁽⁵⁾ Their Lordships are abundantly liberal in permitting amendment of allegations and in admitting matter not on the record even if it has not been before the lower courts.⁽⁶⁾

Although statutory attempts to limit the subject's right of appeal to the fountain of justice have come to naught, there have been of late expressions of opinion from various parts of the Empire which are not so easily ignored as an ultra vires statute. Mr. H. Duncan Hall in The British Commonwealth of Nations,⁽⁷⁾ 1920, sums up the current of adverse opinion when

(1) Theberge v. Landry (1876) 2 A.C. 102.

(2) Moses v. Barker (1896) A.C. 245.

(3) Appeal to the King in Council rests on the injurious decision of any of his courts and not on the British birthright of an injured person. So appeal to the King from the Court of Political Agent is not entertained. Devchand v. Chhotamlal (1906) A.C. 212. No appeal will be allowed from a dictum of a lower court. King v. Louw (1904) A.C. 412.

(4) See Anson: Law and Custom of the Constitution, 2nd ed., pt. II, p. 471 (Oxford, 1896).

(5) Read v. Bishop of Lincoln (1892) A.C. 644, 654-5.

(6) Nireaha Tomahi v. Baker (1901) A.C. 561, 572; Glenswood Lumber Co. v. Phillips (1904) A.C. 405; Blue and Deschamps v. Red Mountain Ry. Co. (1909) A.C. 361.

(7) p. 264. (Oxford, 1920).

he asserts that there is "dissatisfaction felt by the Dominions with the working of the Judicial Committee of the Privy Council" and such an eminent authority in imperial problems as Sir Arthur Keith maintains that "the arguments adduced in favor of the continuance of the appeal are hardly of serious weight"⁽¹⁾ and that "the disappearance of the appeal to the Privy Council can be only a question of time."⁽²⁾ Mr. Hall's statement is evidently inspired by his closer connection with Australia where Imperial legislation has greatly limited appeals for it cannot be taken as a just estimate of the feeling of the majority in Canada. Canadians appreciate, to adopt the language of Lord Haldane, that "there is a class of questions, a class small in number but large in importance, which reaches beyond the analogy of ordinary litigation. Some of the questions which belong to this class concern the ascertainment of the true principles which underlie the type of British Constitution, unwritten as much as written, under which all of us who are subjects of the Sovereign live. Some others of such questions concern topics such as the great principles of that system of common law, itself elastic and developing, which is our common heritage."⁽³⁾ In deciding such questions for the

(1) Keith: War Government in the Dominions, pp. 285-288 (Oxford, 1921) where the arguments are enumerated briefly.

(2) Keith: Dominion Home Rule in Practice, p. 51 (Oxford, 1921.)

(3) See Sisters of Charity of Rockingham v. The King (1922) 2 A.C. 315, 322. On the common law of the Province of Quebec, see Attorney-General for Canada v. Attorney-General for Quebec (1921) 1 A.C. 413, 422-423.

Dominion of Canada the Judicial Committee has not only been the champion of local autonomy where Canadian and Imperial interests conflicted, but also the impartial supporter of a statesmanlike division of powers between provincial and federal interests under the British North America Act.⁽¹⁾ It would not be too extravagant to say that whatever of the genius of the British Constitution inheres in its Canadian counterpart, is due in large measure to the decisions of the Privy Council. "When the legal history of the Dominion is written, it will perhaps be found that Lord Watson played in the interpretation of the Canadian Constitution, to some extent, the part played in the United States by Chief Justice Marshall."⁽²⁾ The Lords of the Privy Council, strange to say, have found their most ardent supporters in the French-Canadians of Quebec and a member of the bar of that province in addressing the Ontario Bar said: "It is up to us to keep in all its glamour, integrity, and efficiency that splendid and unique court whose jurisdiction is more extensive, whether measured by area, population, variety of nations, creeds, languages or customs, than that

(1) This has been recently manifested in Canadian Pacific Wine Co. Ltd. v. Tulley (1921) A.C. 417, which held ultra vires a British Columbia Statute dealing with the local liquor traffic. To have held otherwise would have undermined the effectiveness of the local authorities in this important matter.

(2) Egerton: A Historical Geography of the British Dominions, vol. V, Canada - Part II, Historical, p. 243 (Oxford, 1917).

hitherto enjoyed by any Court known to civilization".⁽¹⁾ The right of appeal from Canada will suffer little curtailment so long as the voice of Quebec is heeded by the Imperial Parliament.⁽²⁾

(iv) Orders in Council

The advice of the Judicial Committee to the Crown is given the force of a decree by an order in Council pursuant to the authority established by the Judicial Committee Act of 1833. The amending act of 1844 provided that it should be competent to the Crown in Council to make such orders as seemed "meet for the instituting and prosecuting" of appeals. Such orders have been made in the desire to equalize as far as possible the conditions under which overseas subjects have a right of appeal and to promote uniformity in the practice and procedure. The Crown, however, has invited the acceptance of any such order by the Dominion and the Provinces before promulgating it. The Federal government, Ontario, and Quebec have, generally refused their acquiescence taking the stand that they alone have the constitutional right to regulate appeals. Where accepted the Orders generally provide for appeals as of right when the claim on matters in dispute in-

(1) Mr. Gagne, K.C., in 56 Canada Law Journal, 89 (1920).

(2) See Canadian Historical Review, December, 1921, p. 395. The Journal of Comparative Legislation and International Law, 3rd series, vol. III, part IV, p. 184 (1921); 57 Can. Law Journal 246 (1921); 41 Can. Law Times 168 (1921), 42 Can. Law Times 137 (1922); The Round Table, (March, 1921), p. 394.

volves in some provinces \$5,000 and in others \$2,500, and as of grace at the discretion of the local court when in its opinion the question in the appeal "is one which, by reason of its great general or public importance or otherwise ought to be submitted to His Majesty in Council for decision."⁽¹⁾

Orders in Council in general may be issued on the authority of Imperial legislation which directs that they be applied to any part or the whole of the Empire. Colonial laws which are repugnant to such orders or regulations are to that extent void and inoperative under the Colonial Laws Validity Act of 1865.

(v) Overseas Representatives of the Crown

The British North America Act declares that the "executive government and authority of and over Canada is to continue and be vested in the Queen,"⁽²⁾ and that Parliament shall consist of the Queen, the Senate, and the House of Commons.⁽³⁾ Thus is the Crown preserved as a "common factor" throughout the Empire. One of its prerogatives is the appointment of a Governor-General as its representative, and so the Act proceeds to prescribe his duties without providing for his appointment. By a well-settled convention of the constitution his appointment is subject to the approval of the Gov-

(1) These Orders in Council will be found in Cameron: The Canadian Constitution, pp. 145-165 (Winnipeg, 1915).

(2) Sec. 9.

(3) Sec. 17.

ernment at Ottawa and his functions have today become as much a matter of form in Canada as have the functions of the King in England. Although the Act permits him to exercise his authority without the advice of His Majesty's Privy Council for Canada and upon orders from London, yet since 1878 his instructions have not required his disregarding the advice of his Ministers except in the exercise of the pardoning power.⁽¹⁾ It is now beyond dispute as a convention of the constitution that the Crown by its representatives in the self-governing dominions can only act on the initiative and advice of its own Ministers in those states.⁽²⁾ Thus has Canada accomplished her ambition expressed in the preamble of her Federation Act to secure a constitution similar in principle to that of the United Kingdom.

The right of the Crown to appoint its representatives for the Provinces was taken away by the British North America Act and given to the Governor-General in Council.⁽³⁾ The Lieutenant-Governor so appointed holds office during the pleasure of the Governor-General⁽⁴⁾ and his salary is provided by the Parliament of Canada.⁽⁵⁾ These circumstances have in the past been employed to demonstrate the alleged lack of a truly

(1) Instructions to the Governor-General of the Dominion of Canada, 1878, Canadian Sessional Papers, 1879, No. 14.

(2) Commercial Cable Co. v. Newfoundland (1916) 2 A.C. 610; Theodore v. Duncan (1919) A.C. 676, 706; Mackay v. Attorney-General for British Columbia (1922) 1 A.C. 457, 461.

(3) Sec. 58.

(4) Sec. 59.

(5) Sec. 60.

federal principle in Canada, but this attack as we have seen was wholly frustrated by Lord Watson in his famous opinion in the Liquidators' Case. It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government." (1)

The assertion, therefore, that "the Crown is one and indivisible throughout the Empire" must not be taken as literally true in every respect. A more guarded statement is that of Chancellor Boyden in the Pardoning Power Case: "Sovereign power is a unity, and, though distributed in different channels and under different names, it must be politically and organically identical throughout the Empire." (2) The Crown in the Canadian Parliament is not the same political organ as the Crown in a Provincial Parliament or in the Imperial Parliament. As a symbol the Crown is one and the same as it runs throughout the Empire but as a constituent element in the Imperial, Federal, and Provincial governments, its attributes vary in degree according as they have been modified by the law and custom of local or higher authority. (3)

(1) (1892) A.C. 437, 443.

(2) (1891) 20 Ont. R. 222, 249.

(3) Exchange Bank of Canada v. Reg. (1886) 11 A.C. 157; Commercial Cable Co. v. Newfoundland (1916) 2 A.C. 610. A provincial Government cannot bind the Crown in the Dominion Government: Gauthier v. The King (1918) 56 S.C.R. 176.

Accordingly it is very essential to our present purposes to appreciate the extent of the authority and immunity which attaches to the Crown's representatives in Canada in their executive capacity. For the extent of their general powers and functions we must look to their commissions for they have no authority which is not therein expressly or impliedly delegated by the Sovereign.⁽¹⁾ But even then we do not find a definitely circumscribed field, for the measure of prerogative so delegated is only that which is essential to the conduct of the executive government of the Dominion or Province. This field, however, in Canada is very wide since by Sections 12 and 65 of the British North America Act the executive authority is made co-extensive with the grant of the legislative powers and is effective even where, as it was held in the Queen's Counsel Case,⁽²⁾ the executive power so exercised would otherwise be part of the prerogative.

The early overseas Governors laid claim to being in loco regis with all the immunity of a king who could do no wrong. But a line of decisions in the courts soon left them with little if any of this illusion, and their effort to set themselves entirely outside the pale of the rule of law was frustrated. Although acting in an official capacity on behalf of the Crown, they still remain subjects of the Sovereign for purposes of suit.⁽³⁾ This anomalous result in the self-governing Dominions

(1) Bonanza Creek Gold Mining Co. v. Rex. (1916) 4 C. 566, 579; Musgrave v. Pulido (1879) 5 A.C. 102.

(2) Attorney-General for the Dominion of Canada v. Attorney-General for Ontario (1898) A.C. 247; and see Bonanza Creek Gold Mining Co. v. Rex (1916) A.C. 566, 585-7.

(3) Musgrave v. Pulido (1879) 5 A.C. 102, and the cases cited in the opinion.

is due to the cases, which established the rule, having been decided when the Governor himself was responsible for the administration as he still is in a Crown Colony to-day. So long as the Governor acts within his authority as Governor he incurs no liability either in tort⁽¹⁾ or contract,⁽²⁾ It has also been held that no mandamus will lie to a Governor in Council,⁽³⁾ but mandamus will lie to a Minister acting purely ministerially and also where a statute throws upon him a special duty towards the public as well as the Crown.⁽⁴⁾ No court, moreover, can interfere with the exercise of discretion entrusted to the executive as long as no provision enacted by the legislature is infringed.⁽⁵⁾ When, however, a governor acts in his private capacity,⁽⁶⁾ or qua Governor, but without the necessary authority, he is amenable to suit in a civil court as is any other subject.⁽⁷⁾

(1) Regina v. Eyre (1868) 1 L.R. 3, Q.B. 487.

(2) Macbeth v. Haldimand (1786) 1 T.R. 172; Palmer v. Hutchinson (1881) 6 A.C. 619; Church v. Middlemiss (1887) 21 L.C.J. 319.

(3) The King v. Governor of the State of South Australia (1907), 4 C.L.R. 1497; Horwitz v. Connor (1908) 6 C.L.R. 39.

(4) Re Massey Mfg. Co. (1886) 11 O.R. 446.

(5) Theodore v. Duncan (1919) A.C. 696, 706. See also Electric Development Co. v. Attorney-General for Ontario (1917) 38 O.L.R. 383, 389.

(6) Hill v. Bigge (1841) 3 Moo. P.C. 465.

(7) Musgrave v. Pulido (1870) 5 A.C. 102.

PART II.

THE SCOPE OF VICARIOUS LEGISLATION

In the course of his opinion on the Manitoba Initiative and Referendum Act Case ⁽¹⁾ Viscount Haldane, speaking for the Judicial Committee, stated that the British North America Act "entrusts the legislative power in a Province to its legislature, and to that legislature only." But he immediately took pains to qualify this somewhat unequivocal assertion by adding: "No doubt a body with a power of legislation on the subject entrusted to it so amply as that enjoyed by a Provincial legislature in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies." His Lordship could have applied practically the same language to the Dominion Legislature and so we turn our attention now to considering in what way and to what extent a Canadian Legislature in particular and colonial legislatures in general, may "seek the assistance of subordinate agencies" without raising what Lord Haldane describes as a grave constitutional question. Delegation to a degree was permissible, but, he said, "it does not follow that it (the legislature) can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence." As the authorities are by no means agreed on this last deduction, it will be our final consideration under this head of vicarious legislation.

(1) (1919) A.C. 935, 945.

I. Legislation by Acquiescence

What may be called legislation by acquiescence does not strictly come under the head of delegation, but it serves as an interesting starting point for our discussion of legislation which may be set up vicariously in the jurisdiction over which the Imperial Parliament has undoubted authority. We are prone to think after centuries of constitutional development that that Parliament is the only source of legislative authority throughout the Empire either by way of delegation or grant, but it must not be forgotten that it is still a sound feature of the Constitution that "the King may give laws to his subjects: and this does not detract from him when he does it in Parliament."⁽¹⁾ This royal prerogative runs throughout the Empire and can only be limited by express statutory enactment.⁽²⁾ In the United Kingdom⁽³⁾ and the overseas dominions⁽⁴⁾ such a limitation has been effected so that in general Imperial Laws and the local laws are only binding when made by the King with the Houses of

(1) Per Crawley, J., in Rex v. John Hampden, (Ship Money Case) (1637), 3 State Tr. 826, 1083.

(2) Maritime Bank v. Regina, (1888), 17 S.C.R. 657 (Canada); Re Bateman's Trusts, (1873) L.R. 15, Eq. 355. On the interpretation of legislation restricting the prerogative, see Attorney-General for New South Wales v. Curator of Interstate Estates (1907) A.C. 519, and Commissioners of Taxation for the State of New South Wales v. Palmer (1907) A.C. 179.

(3) Bill of Rights, 1688, c. 2.

(4) British North America Act, 1867, secs.17, 91.

Parliament. (1) In places, however, which have been acquired by cession or conquest, the Sovereign in Council possesses the sole power of legislation until the power is parted with by his grant of a local legislature or is curtailed by an Act of the Imperial Parliament. The prerogative of the King endures at the sufferance of a sovereign legislature.

The validity of such prerogative legislation was raised in the Fiji Island case of The Queen v. Taaver (1889). (2) A convicted murderer claimed that as a British subject he could only be deprived of the right to be tried by a jury of his equals by an Act of Parliament or of some other duly constituted legislative body and not by an Order in Council which had been passed independently of any statutory sanction. But the court held that "Her Majesty in Council may, of inherent right, until the establishment of a legislature, make laws for the government of her subjects within the Western Pacific Islands." Here by an Order in Council the Criminal Law of England had been made to apply so that the case is also an illustration of the enforcement of prerogative legislation by reference.

But the exercise of this prerogative is subject to certain limitations. As the prerogative of the King is

(1) Middleton v. Crofts, (1763) 2 Atk. 650.

(2) Udal, 155.

founded
 /on the common law and not on the authority of Parliament⁽¹⁾
 the courts will not allow it to be wielded in a manner which
 tended to the high prejudice of a subject,⁽²⁾ or to a res-
 traint on his liberty which the law had not previously recog-
 nized.⁽³⁾ The King could create no new offences;⁽⁴⁾ he
 is bound by the law of the land.⁽⁵⁾ The prerogative can-
 not be delegated except under the authority of Parliament⁽⁶⁾
 and by a convention of the constitution it cannot be exer-
 cised except on the advice of the Privy Council.⁽⁷⁾ The
 Crown may forego its independent legislative function and
 create a legislative assembly in a settled colony, but
 only when the assembly is to be subordinate to the Imperial
 Parliament although supreme within the limits of the colony.⁽⁸⁾
 Once such home rule is granted by the Crown it cannot be
 recalled except by an act of Parliament,⁽⁹⁾ a decision of
 Lord Mansfield's which evinces more of wise statesmanship

(1) Anon (c. 1547), Bro. N. C. 152.

(2) Warren's Case (1587), Moore, K.B. 239.

(3) Ex Parte Barnsley (1744) 3 Atk. 168.

(4) Proclamations' Case (1611), 2 State Tr. 723.

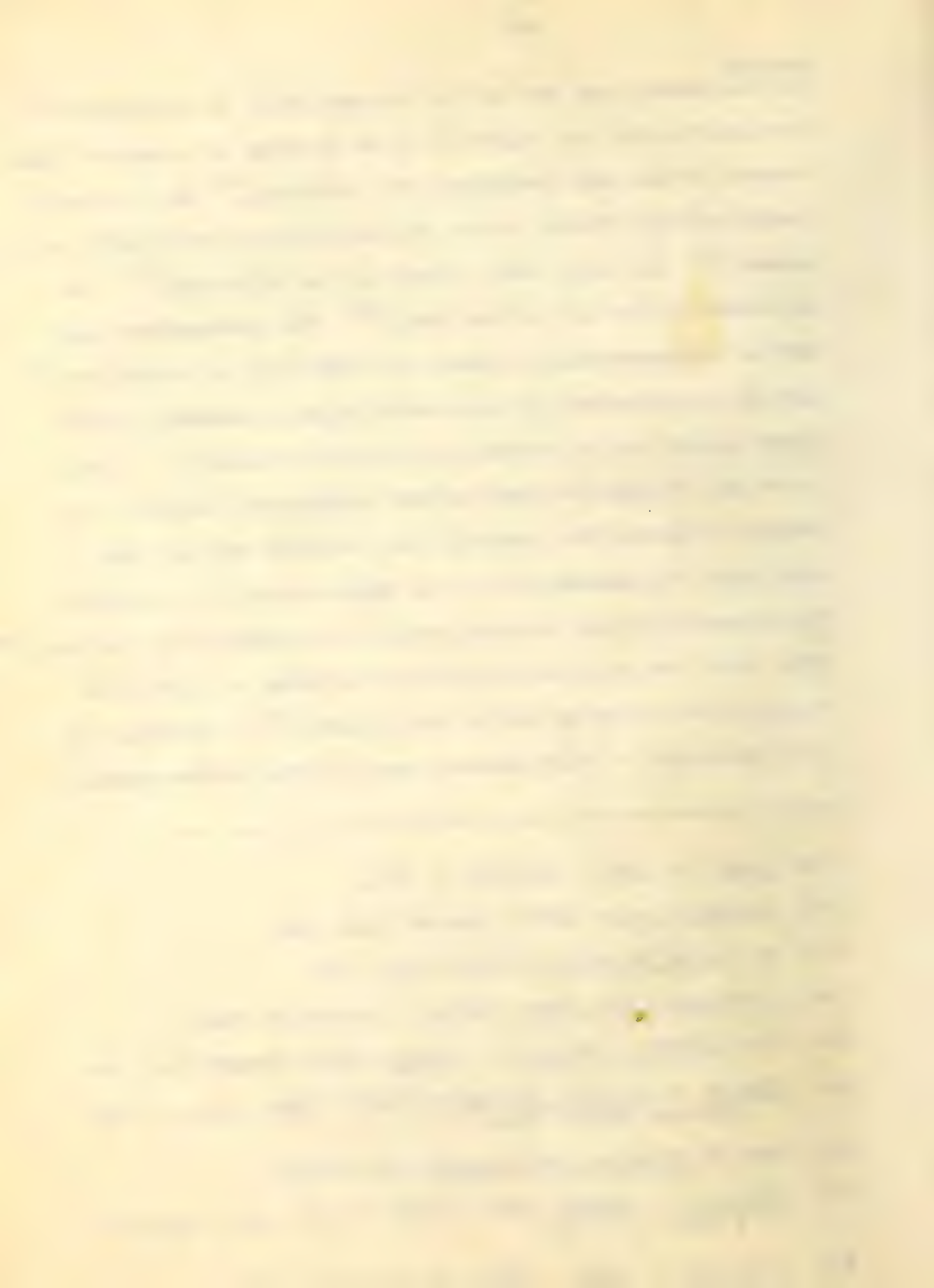
(5) See Attorney-General v. Black (1828) Stuart K.B. 324.

(6) Regina v. Eduljee Byramjee (1847) 5 Moo. P.C. C. 276,
 (Parsee Murder Case).

(7) See 58 Canadian Law Journal 210 (1922).

(8) Kielley v. Carson, Kent (1841) 2 Nfld. L.R. App. X.;
 4 Moo. P.C. 63.

(9) Campbell v. Hall, (1774) 30 State Tr. 239.



than of adherence to legal logic. Local self-government may be thus established by the Crown but it cannot transfer British territory in time of peace so as to place it under the jurisdiction of foreign laws without the concurrence of the Imperial Parliament.⁽¹⁾ The prerogative to legislate does not embrace the power to cede jurisdiction to a foreign authority.

(1) Domodhar Gordhan v. Deoram Kanji (1876) 2 A.C. 332.
Similarly the Crown cannot create a court to administer foreign law. Re Lord Bishop of Natal (1865)
3 Moo. P.C. C. N. S. 115.

II. Legislation by Reference

In an early Canadian case there is to be found the dictum that "were the Canadian Parliament to say that Canadian subjects and Canadian corporations were to be subject to legislation that might be passed by Congress, it would be unconstitutional; it would be authorizing a foreign power to legislate for its subjects; an abdication of sovereignty inconsistent with its relation to the Empire of which it forms a part".⁽¹⁾ In view of the length to which later cases have gone, there is little doubt but what the Canadian Parliament might so legislate for its subjects. Although there is probably no Canadian legislation referring to acts of Congress, there is nevertheless specific reference to "freight classification in use in the United States" in the Dominion Railway Act of 1906⁽²⁾ and the Privy Council saw no reason to question such a method of legislation when that clause was the object of litigation in Canadian Pacific Railway Co. v. Canadian Oil Companies, Ltd. (1914)⁽³⁾

Legislation by reference serves a very useful purpose in Canada. There are often matters upon which the Dominion government is desirous and competent to legislate and yet

(1) International Bridge Co. v. The Canadian Southern Railway Co. (1880) 28 Gr. 114, 134.

(2) R.S. Can., 1906, c. 37, s. 321, sub-s. 4.

(3) (1914) A.C. 1022.

for reasons of policy they do not wish to establish a universal rule which would not be acceptable in some of the provinces. Accordingly the local legislative wishes may be incorporated by reference in the Dominion Act. Thus where the Dominion Government declared itself to have exclusive legislative jurisdiction over a railway situated wholly within the Province of Ontario as being a work for the general advantage of Canada, the Federal authorities were not anxious to offend local sentiment by thus enabling the railroad to escape compliance with the provincial Sunday observance law, and so they passed legislation to the effect that such a railway should be subject to any act of the Provincial Legislature prohibiting or regulating work on Sunday which was in force at the time, and further authorized the Governor-General in Council to confirm by proclamation from time to time any subsequent Provincial act to the same end, such act being "made as valid and effectual as if it had been enacted by the Parliament of Canada."⁽¹⁾ It is to be observed that this latter feature of the Railway Act involves conditional legislation by reference.⁽²⁾ Again, in the qualifications for jurors in criminal cases the Dominion government legislated by reference to the Provincial Act and the courts found no difficulty in affirming

(1) Kerley v. London and Lake Erie Transportation Co.
(1912) 26 Ont. L.R. 588.

(2) Cf. The Queen v. Burah (1878), 3 A.C. 889.

the constitutionality of such a method in law-making.⁽¹⁾ When, however, the legislation which is the subject of reference is ultra vires the authority of the enacting body this method is of no avail to supply the want of legislative power.⁽²⁾

Legislation by reference has also been of great service throughout the Empire. By this method salutary laws elsewhere prevailing may be gradually introduced into newly annexed territories when the native inhabitants have so far advanced in civilization and social progress as to make their adoption advisable where there is little if any local law upon which to build a distinct system. Thus in one instance following a treaty with the Sultan of Zanzibar Her Majesty issued an Order in Council (1884) declaring certain Indian enactments to be applicable to Zanzibar, and, further, that any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council, should also be applicable, but that they respectively should not come into operation until such times as the Secretary of State should fix.⁽³⁾ A limitation on this method of initiating laws in new colonies was established by the Privy Council in the case of

(1) Regina v. O'Rourke, (1882), 1 Ont. R. 464; Regina v. Prevost (1885), M.L.R. 1 Q.B. 477, Quebec.

(2) Quimet v. Basin (1912) 46 S.C.R. 502.

(3) Secretary of State for Foreign Affairs v. Charlesworth, Pilling and Co. (1901) A.C. 373.

Sir John Sprigg v. Sigcau (1897).⁽¹⁾ Under an Imperial Act the Governor of Cape Colony was given authority to add to the existing laws, already proclaimed and in force in the annexed territories, such laws as he should "from time to time by proclamation declare to be in force in such territories". The Board held that this did not permit him to make new laws of his own design but only to transplant to those territories laws which were already in force in other parts of the Colony.

In Ince v. Thorburn (1886)⁽²⁾ the Superintendent of Trade in China had authority under an Imperial Order in council to make regulations for the peace, order and good government of the Foreign Community of Shanghai. The Judicial Committee upheld a regulation which ^{was} put in force by reference to the Land Municipal Regulations that had been voted at a meeting of the tenters and agreed to by the representatives of England, France, Germany and the United States, and sealed by an officer of the Chinese Government.

Legislation by reference on its proper analysis does not invoke the Constitutional problem of delegation by the law-making authority. Between legislation by reference and the delegation of legislative power "the distinction",

(1) (1897 A. C. 238.

(2) (1886) 11 A. C. 180.

as Cameron, J., says in *Regina v. O'Rourke*, (1882),⁽¹⁾
 "may be fine, but it appears to me to exist". Wilson,
 C. J., said in the same case when it was in the lower
 court: "It is a Dominion law enacted not in exten^o"
 but by relation and reference to a law of Ontario....Legis-
 lation by relation and reference would not be a delega-
 tion of power, because the Provincial Legislature would
 have no choice in accepting or acting upon or rejecting the
 Dominion enactment, and they have no power to alter or re-
 peal it, although they may defeat it or change it by alter-
 ing their own legislation to which the other has relation."

(2) There is no valid reason to question the power of
 any legislature to draft and enact a statute with reference
 to the laws of regulations of another jurisdiction any more
 than there is to attack legislation in general which is
 drawn up with relation to the facts of life in the commun-
 ity.

(1) (1882) 1 Ont. 464, 481.

(2) (1882) 32 C. P. 388, 402.

111. Conditional Legislation.

Does legislation which is to come into effect when a stipulated condition is fulfilled, either automatically in the course of events, or by the action of some extra-legislative agent, advance us into the problem of delegation any more than did legislation by reference? It seems obvious that the former situation will not. But where the latter situation obtains it seems necessary to look into the cases in some detail in spite of Lord Selborne's assertion in The Queen v. Burah (1878) that anyone who imagines that delegation exists in such instances labors under "a mistaken view of the nature and principles of legislation".

The leading case of the Judicial Committee is The Queen v. Burah (1878), ⁽¹⁾ and as it involves so many of the elements of vicarious legislation which we are here reviewing it is worth while to state the entire facts rather than simply those which have to bear on the immediate question of conditional legislation. In 1869, the Governor-General of India enacted in Council, in the due and ordinary course of legislation, that certain districts were to be removed from the jurisdiction of the ordinary courts and offices, and to come under new courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal. The Act stipulated that the Lieutenant-Governor

(1) (1878) 3 A. C. 889.

himself was to say not only at what time the change was to take place, but also in which district or districts enumerated this piece of legislation should become operative. Furthermore, he was authorized to apply by public notification to any district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, in the other territories subject to his government. Lord Selborne said, in reversing the decision of the High Court in India, the majority of whom had held that the Governor-General had no power to delegate such authority, "it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act itself. The proper legislature has authorized its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute". Conditional legislation, his Lordship adds, is highly convenient in many instances and the statute books of the Governments of the Empire witness its frequent use. (1)

(1) Sir John Sprigg v. Sigean, (1897) A. C. 238, (fr.

That a discretion of far greater scope than that under review in The Queen v. Burah has made no difference in the validity of so-called conditional legislation is evident from the decision of the Privy Council in Theodore V. Duncan (1919).⁽¹⁾ In that case an act of the Queensland legislature authorized the Governor in Council to extend the operation of the act from time to time, by Proclamation published in the Gazette, so that the Government might be able to acquire "live stock or things whatsoever in such proclamation mentioned", the act to extend and apply to the community in question "to the same extent and in the same manner as if such commodity were expressly mentioned in this Act." There was also authorized the fullest discretion as to time and quantities to be chosen by those Ministers having the administration of the act. Their Lordships saw no reason to impugn this method of legislating.

Where, however, the condition precedent to an act of the legislature, having full force and effect, is the finding of certain facts by the executive official named in the Act, there is more plausible ground for the argument of delegation to stand on; and yet apparently this has had no

Cape Colony); Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co. (1901) A. C. 216; Attorney-General for Manitoba v. Attorney-General for Canada (1904) A. C. 799; Ferry v. Clissold (1907) A. C. 73 (fr. Australia); Manu Kapua v Para Laimona (1913) A. C. 761, (fr. New Zealand).

(1) (1919) A. C. 596.

influence on the opinion of the courts. Such a situation arose in the recent case of Wilson v. Esquimalt and Nanaimo Rly. Co. (1922) ⁽¹⁾ on appeal to the Judicial Committee from British Columbia. An act of the province provided that if the Lieutenant-Governor in Council found that a settler on a certain belt of land could adduce "reasonable proof" of his occupation of the strip he claimed, as well as improvement and a bona fide intention of living on the land, he was entitled to a Crown grant of the fee simple in the land. The Board were chiefly concerned with the process of fact-finding, to which we will advert later, but did not question the authority of the legislature to delegate the finding of the facts to the Governor in Council. In instances where the Legislature makes it lawful for the Governor to direct some well-qualified person to report on the facts, the Board, nevertheless has held that the report made does not have to be followed by the Governor ⁽²⁾ If, as their Lordships held in Cook v. Ricketson (1901), ⁽³⁾ leaving to the Governor in

(1) (1922) 1 A.C. 202, and see also McGregor v. Esquimalt and Nanaimo Rly Co. (1907) A. C. 462; Wijeysekera v Festing (1919) A. C. 646 (fr. Ceylon) The finding of fact was to be made by a minister in Canadian Northern Pacific Railway v. New Westminster (1917) A. C. 302 (fr. Br. Col.) and City of Armstrong v. Canadian Pacific Railway Co. (1920) A. C. 216.

(2) Wijeyesekera v. Festing (1919) A. C. 646 (fr. Ceylon); and see Government Agent v. Perera (1903)

(3) (1901) A. C. 588, (fr. N. S. W.)

Council complete discretion to decide the necessity of bringing an act into operation works in some cases "a græevous hardship" the injustice is to be laid at the door of the legislature alone.

The point of delegation in a somewhat similar situation however, provoked an extensive discussion by the Privy Council in Powell v. Apollo Candles Coy. Ltd., (1885),

(1) A Customs Act of New South Wales had provided that "whenever any article possesses, in the opinion of the collector, properties in the whole or in part which can be used for a similar purpose as a dutiable article, the Governor is authorized to levy a duty upon such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article". The Supreme Court of the State maintained that this gave the Governor and the Collector authority to impose duties on articles which the Legislature never had in its contemplation, and that this amounted to nothing "more nor less than the Legislature delegating the power to impose taxes", which, by the Constitution Act, had been assigned to the Legislature. To which argument the Judicial Committee replied that "the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The Legislature has not parted with its perfect control over the Governor,

(1) (1885) 10 A. C. 282.

and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him." And they further held that the opinion of the collector, whether right or wrong, authorized the Governor to take action ⁽¹⁾. In Attorney-General for New South Wales v. Walters (1898) ⁽²⁾ their Lordships held that the finding of fact of a Land Board was to be conclusive, but in so much as the legislature had said that it should "be lawful" for the minister of Lands to act on such finding he had full discretion as to whether he should abide by it or not.

Local option acts carry conditional legislation to the point where the Governor in Council is authorized to declare the statutory will of the legislature in effect in any particular locality where the electors express their desire that the legislation in question should henceforth obtain. The Canada Temperance Act, 1878, which embraced such provisions further provided that the Order in Council issued by the Governor-General following the adoption of the Act by the local electors was not to be revoked for three years, and then only after they had resorted to the same procedure as brought the Act into force. The Act prohibited the sale of intoxicating liquors generally and made sales in violation of the prohibition criminal offences. It was

(1) See also Wellington Corporation v. Johnston (1902) A. C. 396. (Fr. M. Z.).

(2) (1898) A. C. 460.

attacked on the ground that the Dominion Parliament had delegated its authority to pass such penal provisions to a majority of the electors of counties and towns. But the Judicial Committee in Russell v. The Queen (1882)⁽¹⁾ said that the "short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it dealsParliament itself enacts the condition and everything which is to follow upon the condition being fulfilled".⁽²⁾ When, however, what was to follow on the conditions of the Manitoba Initiative and Referendum Act being fulfilled might be a statute which the legislature had not passed nor the Lieutenant-Governor assented to, their Lordships found delegation which raised a grave constitutional question.

When such an extreme example of an attempt at conditional legislation as evinced by this Manitoba Case provokes the conclusions that it is delegation carried beyond constitutional limits one is tempted to pause and scrutinize

(1) (1882) 7 A.C. 829, (fr. New Brunswick) Attorney-General for Ontario v. Attorney-General for Canada (1896) A.C. 348 acc.

(2) Where the legislature has imposed the restriction of a referendum on the exercise of some of the powers of a municipal corporation the courts will not permit any evasion. United Buildings Corporation v. City of Vancouver (1915) A. C. 345, dictum at 353; In re Barclay and Darlington Township (1854) U. C. Q. B. 86; In re Scott and Corporation of Tilsonbury (1886) 13 Ont. Ap. Rep. 233.

the decisions which have been reviewed above to see if there is not some degree of delegation no matter how small. The pursuit, as will appear shortly, may be of mere academic concern, but it will not the less adduce the considerations if any, which have entailed such consistency in the cases now under consideration.

Probably no one will quarrel whatever with classing as conditional legislation such an act as was involved in Coates v. The Queen (1900) ⁽¹⁾ where the Governor was authorized to take possession and title to a railway to the exclusion of the company and its debenture-holders on the happening of certain events and the expiration of a time limit for construction. The conditions were beyond the Governor's control and in taking action he was acting in an executive capacity only. Again, we may accept for this category a by-law which was not to come into operation until an agreement has been made with the public utility company concerned, as contemplated in their act of incorporation; ⁽²⁾ and also a private act confirming and validating an agreement between the shareholders of a company on the condition that the act be adopted by seventy-five per cent of the shareholders ⁽³⁾ But where discretion and fact-

(1) (1900) A. C. 217, (fr. B.2.)

(2) Winnipeg Street Ry Co. v. Winnipeg Electric Street Ry Co. and the City of Winnipeg (1894) A. C. 615.

(3) Pacific Coast Coal Mines Ltd. v. Arbuthnot (1917) A. C. 607. (fr. Br. Col.).

finding are left to someone outside the legislative body is it so clear that the operation and scope of the statute is in no way determined by such external agents? When we find a court saying, "The Governor-General ⁽¹⁾ does not legislate, using that word in the true sense", and, again, the legislature "retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands", ⁽²⁾, we are inclined to fear that the court themselves are not so sure that what they affirm to be conditional legislation is still in its purest form. They claim that "there is no subject handed over (to the Governor) to legislate upon as he pleases without any substantive provision as to consequences by the parliament itself". ⁽³⁾ But surely those affected by a law are as much interested in the adjective provisions as the substantive provisions. Under ordinary circumstances the force, and effect of a statute would be interpreted by a court, that branch of government which has been evolved and clothed with an accepted process in the development of the legal machinery of the community. ⁽⁴⁾ In the majority

(1) Per Isaacs, J., in Baxter v. Ah Kay (1909) 8 C. L.R. 626 at 641.

(2) Powell v. Apollo Candle Co. (1885) 10 A.C. 282, 291.

(3) Note ⁽¹⁾ supra.

(4) Cf. Hoggan v. Esquimalt and Nanaimo Ry. Co. (1894) A. C. 429 and Wilson v. Esquimalt and Nanaimo Ry. Co. (1922) 1 A. C. 202.

of instances of conditional legislation, however, the legislature leaves certain essential details in fixing the incidence of their enactment to one to whom they give the widest discretion without prescribing any standards or guides which he is to observe in exercising a function which has a far-reaching effect. Traditionally this function has been the exclusive prerogative of the legislature. If now this outsider is to share in it, it would seem more honest to admit ~~that~~ he does enjoy a degree of delegated legislative authority. Perhaps a more accurate estimation would be his contribution is supplemental, that the function he performs supplements the legislative function at a point where the law-making body displays an inherent defect. No one will dispute the efficacy of the various statutes which have been reviewed in the cases above and one would indeed find it difficult to devise a scheme as a substitute for any there presented which accomplished the same result with like despatch and saving of expense. The truth is that modern government calls for just such methods of law-making and if the legislature is to respond it must seek assistance beyond its traditional precincts. That which they call conditional legislation is of great convenience and of well recognized use the Judicial Committee and the courts in the Empire have not hesitated to admit ⁽¹⁾ and

(1) The Queen v. Burah (1878) 3 A. C. 889, 906;
Russell v. The Queen (1882) 7 A. C. 829, 835.

it may be well surmised that in supporting it the bench have been unconsciously impelled by such considerations, We submit, however, that it would have been better for the courts to have admitted frankly that this was supplemental legislation whose validity was based on the necessity of coping with the inherent deficiencies of a legislature. By so doing they would have obviated the embarrassment that must arise when they are called upon to uphold an enactment of the legislature which hands over to an executive official an all too obvious share in a distinctly legislative task.

A certain license may be permitted the court in describing the function of the Lieutenant-Governor of Bengal in the The Queen v. Burah as being merely the instrument through which the conditions laid down by the legislature were to be thrust into the process of effecting the legislative will, for there he was simply to fix the respective times at which the enactment was to come into operation in the specified subdivisions of a given area. But when this type of legislation advances by imperceptible degrees under the impulsion of the exigencies of the governing of an increasingly complicated society, to the point where, as in the Australian Treaty of Peace Act, (1919) a legislature confers upon the Governor-General a power to do all things necessary to give effect to the Treaty, the courts, in still sustaining it as conditional legislation, are indulging

in a flight of the imagination that exposes them to an
 (1)
 unanswerable criticism.

The intuition of the court has been right; ~~such~~ so-called conditional legislation is to be sustained for two very sufficient reasons. First, this type of legislation promotes the efficiency of government; and secondly, the courts have no authority to impugn a method of affecting private rights introduced by the legislature no matter what its possibilities for abuse. The legislature is the sovereign authority. There is no fundamental law of the land embracing so called principles of natural justice to which it must conform. If the device of the legislature sterilizes the power of the courts in their traditional task of protecting the individual's interests then the statute making authorities are the ones to be blamed, and the ones to be forced to alleviate the situation they have created. "If", as Lord Selborne said in The Queen v. Burah, "what has been done in legislation, ^{is} within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (i.e. any Imperial Act), it is not for any Court of Justice to inquire further, or to enlarge

(1) Roche v. Kronheimer (1921) 29 C.L.R. 329. Sec. 2 of the Act is as follows: "The Governor-General may make such regulations and do such things as appear to him to be necessary for carrying and giving effect to the provisions of Part X (Economic Clauses) of the said Treaty".

constructively those conditions or restrictions". (1) But it does not behoove a Court of Justice to parade in false colors a clear case of delegated legislative authority. Disguising the true situation may retard the production of necessary alleviating measures which Parliament alone can bring forth, should the supplemental agencies of the legislature fail to do so themselves.

(1) (1878) 3 A. C. 889, 905.

IV. Subordinate Legislation.

It is very difficult to see why, in dealing with conditional legislation, the courts, apparently imagined themselves in the throes of a dilemma. When they were confronted with a statute which set up an authority to make rules and regulations which should have the full force and effect of the law, even to the extent of being penal, the courts immediately found complete constitutional sanction for such a deliberate delegation of the legislative function. There was no doubt, to adopt the words of Viscount Haldane, that the legislature could seek the assistance of sub-ordinate agencies. The maxim that delegatus non potest delegare was utterly beside the point. A colonial legislature had "plenary powers as large and of the same nature as those of Parliament itself", as Lord Selborne said in The Queen v. Burah. It was "a legislature restricted in the area of its powers, but within that area unrestricted", in the language of Powell v. Apollo Candle Co. The legislature was not a delegate of the Imperial Parliament. Nor was it a delegate of its own electorate. Such sovereignty as a self-governing dominion possessed, lay in the law-making authority and not in the people. And should such an external agency chosen by the legislature be the executive branch of the government there was no constitutional doctrine, as in the United States, that a separation of powers must be respected. In the British

Government and its colonial off-spring there was a convenient distribution of powers but no hard and fast separation of powers.

Cases, therefore, involving the validity of subordinate legislation do not require the critical review accorded to those on conditional legislation.. The courts not only admit the convenience and necessity of such ancilliary law-making but have found no immediate constitutional obstacles to establishing its validity.

For the purpose of taking up the points involved in legislation of this type the cases are best grouped when in answer to the question -- what person or body may be a delegatee of this authority to make subordinate legislation? Then in each instance where delegation is sustained it will be necessary to inquire further, -- with what range of authority, both objective and territorial, may the legislature endow the delegatee? And, what control, if any, must the legislature retain over the delegatee? This last consideration will be a matter which may be more easily taken up with reference to all instances of delegation at the close of the topic.

(i) The Governor in Council.

The leading case on the power of the legislature to delegate a legislative function to a member of the executive branch of the colonial government is The Queen v. Burah, (1878)⁽¹⁾ already considered in connection with conditional legislation. It will be remembered that in that case the legislative authority in India, the Governor-General in Council, passed an Act enabling the Lieutenant-Governor of Bengal by public notification to bring into operation within a certain district, placed under his jurisdiction by the Act, any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority," in other territories subject to his government". On account of this reservation that the Lieutenant-Governor could only bring into operation certain existing or future laws the case is not a very strong one for the authority of the Executive to enact measures of legislative force which have not been considered by the Parliamentary body. But when the machinery of modern government required the Executive making rules and regulations under the authority of an ancillary to a statute The Queen v. Burah, was relied on as a precedent. Such a practice today is frankly accepted.

(1) (1878) 3 A. C. 889.

It stands to reason that a colonial legislature cannot delegate to no matter whom an authority which it does not possess itself. ⁽¹⁾ The ambit of its legislative jurisdiction is always confined by some constitutional instrument. The Imperial Parliament alone is in the nature of things unrestricted in the matter. But once the legislature is permitted to act there is no question but what it may assign a delegate to pass ancillary regulations having the full force and effect of statute law. ⁽²⁾ If the legislature can make the rules of procedure for the courts then it may turn over the task of drafting them not only to the judiciary, but to the Lieutenant-Governor, the executive branch of the government. ⁽³⁾ If the legislature may take measures in apprehension of war then it may delegate to the Governor in Council the power to make orders and regulations from time to time as he may deem it necessary ⁽⁴⁾ Although there may be obvious objections

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- (1) Attorney-General for Ontario v. The Distillers and Brewers Assn. of Ontario (1895) 1 D. 348, 364 (The Liquor Prohibition Appeal); Great West Saddlery Co. v. The King (1921) 2 A. C. 91.
- (2) Attorney-General for British Columbia v. Milne (1892) 2 B.C. (Hunter) 196; Minister of Mines v. Haney (1901) A. C. 347; Taxation Commissioners v. Mooney (1907) A. C. 342; Quimet v. Basin (1911) 46 A. C. R. 302, at 314.
- (3) Sewell v. British Columbia Towing Co. (1883) 12 Sup. Ct. of Canada but unreported; see Cass. Dig. 480.
- (4) Re Gray (1918) 87 S. C. R. 150. Cf. King v. Halliday, (1917) A. C. 260.

of a political character, as was remarked by the Supreme Court of Canada in Re Gray (1918), to the practice of executive legislation in that country because of local conditions, these objections should be urged in Parliament when the War Measures Act is being discussed. Again, when a treaty of peace has been concluded the legislature may assign to the Governor the task of making all measures of a legislative nature to carry out the terms of the treaty.⁽¹⁾ No matter what the results of the measures taken by the Governor, whether they be fair or unfair,⁽²⁾ of great economic and social importance or not⁽³⁾, they have the same effect as if enacted in an act of the legislature and are not opened to be questioned in any proceeding whatsoever.⁽⁴⁾

The only ground upon which such regulations may be attacked is that they are ultra vires, that is, beyond the power of the Governor created by the legislature, or that some irregularity has occurred in their publication.⁽⁵⁾

(1) Roche v. Kronheimer, (1921) 29 C. D.R. 329.

(2) Canadian Pacific Ry Co. v. Toronto (1911) A. C. 461, at 470.

(3) Farex v. Burvett (1916) 21 C. L.R. 433; Starr v. Banner Coal Co. Ltd. (1919) 3 W.W.R. 259 (Alberta)

(4) Addar Kahn v. Mullins (1920) A. C. 391, (fr. Queensland).

(5) Chappelle v. The King (1904) A. C. 127, 136.
regulations made or approved by the Lieutenant-Governor in Council in pursuance of a statute are

Such regulations derive their validity from the statute which created the power to make them. The executive would not otherwise have any authority to alter the law of the land ⁽¹⁾ Accordingly, any regulation fails which is repugnant to the authorizing statute, ⁽²⁾ or which purports to cover a wider scope than that manifested by the legislature. ⁽³⁾ An Act permitting the Governor-General in Council to take necessary measures in time of war with power to enforce fines and imprisonment does not warrant his suspension of the remedy of habeas corpus. ⁽⁴⁾ Such a grave interference with a traditional bulwark of the liberty of the individual would hardly be left to the discretion of a subordinate to the permanent custodian of the people's welfare. Similarly, there cannot be a re-delegation by the delegate unless the statute clearly permits. If "the Governor-General in Council may, whenever he considers it necessary or expedient, prohibit the landing in Canada of any specified class of immigrants" then he

subject to the same rules respecting their validity and construction as the regulations, not of a representative body, but of any other non-representative public authority acting under statutory authority. Chowes v. Board of Trustees for Edmonton School District No. 7. (1915) 9 Alta. L. R. 106, 115-116.

- (1) The Zamora, (1916) 2 A. C. 77, 90.
- (2) Hartley v. Matson (1902) 32 S. C. R. 575.
- (3) In re Marian Singh (1913) 18 B.C.R. 506;
In re Behari Lal (1908) 13 B. C. R. 415.
- (4) Perlman v. Piche (1918) 54 Que. S. C. 170,
41 D.L.R. 147.

cannot delegate the exercise of discretion to the Minister of the Interior.⁽¹⁾ Parliament has in terms imposed this duty on His Excellency in Council, and upon him alone so that he has no power to clothe a minister with a power with which the legislature alone could clothe him. But the machinery of administration sometimes calls for a liberal application of this rule and it has been held that the Governor in deciding to operate ~~certa~~^r in coal fields as a war measure may appoint a Director of Coal Operations and require the owners and managers of mines "to comply with the orders and directions of the Director".⁽²⁾

(ii) Administrative Boards and Commissioners

On the constitutional authority of a colonial legislature to create regulative boards and commissions the leading decision is Hodge v The Queen (1884)⁽³⁾ In that case the Ontario Liquor License Act of 1877, provided for, ^{a board in} each city, county or electoral district as the Lieutenant-Governor should think fit, and authorized such a board to make regulations defining the conditions and qualifications requisite to obtain licenses, and limiting the number of licenses in the locality. A board was further

(1) In re Behari Lal. (1908) 13 B.C.R. 415.

(2) Starr v. Banner Coal Co Ltd. (1919) 3 A. W. R. 259 (Sup. Ct. Alberta).

(3) (1884) 9 A.C. 117.

empowered to prescribe penalties for infractions of its regulations, and persons found guilty could be fined or imprisoned by a Police Magistrate. In sustaining the validity of such legislation the Privy Council advanced the principle of The Queen v. Burah further by saying that "within these limits of subjects and area (i.e. as set out in the British North America Act) the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail..... How far it shall seek the aid of subordinate agencies, and how long it shall continue them are matters for each legislature, and not for the courts of law, to decide".⁽¹⁾

Very often it is required that the regulations made by such subordinate agencies shall be approved by the Governor before they are enforced; but this does not make these agencies mere appendages of the legislature.⁽²⁾ Their

(1) (1864) 9 A. C. at 132.

(2) (Fox v. Government of Newfoundland (1898) A. C. 667.

identity is distinct. It is a clear case of a delegated legislative function. (1) And not only may the law-making power be delegated to these bodies but also any right to a course of action to which the government may be entitled by contract, prescription or otherwise. (2)

The only limits, as we have already seen, to the well-settled power of a legislature to seek the aid of ancillary bodies is the objective (3) and territorial (4) range of its own constituent authority. No legislature can validly delegate authority it does not possess. (5) Thus the recent efforts of the Dominion Parliament to empower a Board of Commerce to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as that Board might consider to be detrimental to the public interest, as well as

(1) School District No. 9 v. Haines 36 N. B. R. 617.

(2) Divisional Council of the Cape Division v. De Villers (1877) 2 A. C. 567

(3) Attorney-General for Ontario v. Attorney-General for the Dominion (Liquor Prohibition Appeal) (1896) A. C. 348, 364.

(4) Burrard Power Co. Ltd. v. The King (1911) A.C. 87.

(5) Montreal v. Montreal Street Railway (1912) A.C. 333; British Columbia Electric Ry Co Ltd. v. Vancouver (1914) A.C. 1066. See also Attorney-General for Commonwealth of Australia v. Colonial Liquor Refining Co. Ltd. (1914) A.C. 237. Provincial works that the Dominion has declared of Federal importance will revert to local works when the Dominion repeals the statute, and they will thus again come under the jurisdiction of a local adminis-

further, to restrict the accumulation of food, clothing, and ^{fuel} ~~fuel~~, was held to be ultra vires, as the jurisdiction over "property and civil rights in the Provinces" had been assigned exclusively to the Provincial Legislatures by the British North America Act.⁽¹⁾

Once this Act of 1867, however, which divides the objective fields of legislation between the Federal and Provincial governments has been construed as enabling the delegation desired then the further problem arises in the courts of seeing that the establishing of a Board meets all the conditions imposed by the enactment of the Legislature. Thus in Montreal Street Railway Co. v. The Board of Conciliation and Investigation (1913)⁽²⁾ Dominion legislation in providing that the Minister of Labor might on application appoint a Board of Conciliation and Investigation to aid in the prevention and settlement of strikes and lockouts in mines and industries, was attacked on the ground that it was ultra vires. The Court of Review of Quebec, however, sustained the legislation. The question then arose as to the power of the Court to prevent a Board appointed by the Minister from assuming jurisdiction and issuing orders when

trative board. Hamilton, Grimsby, and Beamsville Ry. Co. v. Attorney-General of Ontario (1916) 2 A.C. 583

(1) In re the Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919 (1922) 1 A. C. 191.

(2) (1913) 44 Que. S. C. 350.

the legislature has said that the decision of the Minister on whether the provisions of the Act applied to any particular labor dispute or not should be final. The court claimed that they had every "desire to give full effect to the final discretionary power of the Minister acting under the statute, to name or not to name a board". But they, nevertheless, held that the proper parties had not made the application for a Board, that at the time the Board proposed to proceed to investigate there was no industrial dispute coming within the purview of the Act, and that, therefore, the Board appointed was unlawfully constituted and should be restrained from exercising a jurisdiction it did not possess. When the Minister acted upon a misstatement of fact the court maintained that it was bound to interpret and when interpreted, apply the statute, under which the Board had been created and purported to act.

This problem of ascertaining whether a Board has jurisdiction or not is more often one of construing the meaning of the words of a statute⁽¹⁾ or of determining whether a general grant of authority to a Board permits it to enlarge its powers beyond those otherwise specifically conferred by the legislature⁽²⁾ As the ambit of the powers

(1) Canadian Pacific Ry Co. v. City of Toronto and Grand Trunk Ry Co. (1911) A.C. 461; Toronto Suburban Ry. Toronto (1915) A.C. 590.

(2) Grand Trunk Ry Co. v. Landowners in Streets in Fort William, Fort William Land Investment Co 3t al (1912) A.C. 224.

of any of these subordinate agencies is prescribed by statute, (1) it follows, that as the establishing of a Board and its assumption of jurisdiction must conform to the will of the law-making body, so in the next place the courts may be resorted to to ascertain whether the exercising in any particular instance of the Board's legislative and executive functions are sanctioned by the same necessary authority. Every regulation and order must be justified as within a power delegated by statute. Should a regulation be ultra vires of the board a subsequent statute amending the first so as to authorize the regulation will not render it valid. The regulation must be (2) repromulgated under the newly acquired authority.

(iii) Municipal Corporations.

The only subordinate legislative agency for which there is specific sanction in the British North America Act of 1867 is that of municipal corporations. By Sec. 92, No. 8, the Provinces are given exclusive authority to

(1) Shaw, Savill and Albion Co. v. The Timaru Harbour Board, (1890) 15 A. C. 429 (Ir. H.2.)

(2) Minister of Railways and Harbours of the Union of South Africa v. Simmer and Jack Proprietary Mines, Ltd. (1918) A.C. 391. On legislative ratification of acts done by Commissioners appointed under a statute later declared ultra vires see Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Quebec Bank (1920) A.C. 230.

legislate on "Municipal institutions in the Provinces"

Although in terms that is no intimation that legislative authority may be delegated to a municipality yet the expression employed has been interpreted in the light and practice of the time when the Federation Act was written so that "municipal institutions" is taken by the courts" to give compendious expression to the state of affairs which exist in a defined populated area, the inhabitants of which are incorporated and entrusted with privileges of local self-government or administration responsive to the needs, the health, the safety, the comfort, and the orderly government of an organized community".⁽¹⁾ Municipalities in Canada are accordingly creatures of the Provincial Governments. As the Court remarked in the Quebec Case of Valois v. La Cite de Sorel" les institutions municipales dans cette province relevant de la legislature, que celle-ci peut les organiser comme elle veut et repartir les pouvoirs selon ce qu'elle croit desirable".⁽²⁾ All the Provinces have general acts covering the organization of municipalities⁽³⁾ so that they are the creation of a statute and not of a charter granted by a representative of the

(1) Per Boyd, C., in Smith v. City of London (1909) 20 Ont. L.R. 133 at 154.

(2) (1918) 83 Que. S. C. 45 at 50.

(3) See Wickett: City Government in Canada, No. 1 and Present Conditions, No. 2. in Vol. 11, University Toronto Studies, Municipal Government in Canada. (Toronto, 1907).

Crown.⁽¹⁾ They have no capacities, therefore, which spring from the common law. Their powers are to be found solely in a statutory authority.⁽²⁾ Likewise their liabilities⁽³⁾, in addition to those entailed as suable corporations⁽⁴⁾ and their responsibilities⁽⁵⁾ may be fixed by the legislature, or by an administrative agency duly authorized to do so by the legislature⁽⁶⁾ even if that agency be another municipality.⁽⁷⁾

For some little time after the passing of the British North America Act it was thought by the courts that since the Provinces had exclusive jurisdiction to legislate as to "municipal institutions" it was a valid implication that they might endow a municipal corporation with powers of any

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- (1) Morse: Municipal Institutions in England and Canada, (1905) 41 Can. Law J. 505.
- (2) John MacKay and Co. v. Toronto (1920) A.C. 208; Waterous Engine Works Co. v. Corporation of Palmerston (1892) 21 B.C.R. 595.
- (3) City of Quebec v. Bastien (1921) 1 A.C. 265
- (4) City of Hawthorn v. Kinnulnik (1906) A.C. 105 (Ir. Vict.).
- (5) Hull Electric Co. v. Ottawa Electric Co. and City of Hull (1902) A.C. 257. See also Smith v. City of London (1909) 20 Ont. L.R. 155; Beardmore v. Toronto (1910) 21 Ont. L.R. 505; Vancouver Power Co. Ltd. v. District of Vancouver (North) (1917) A.C. 598; Lalifax v. Nova Scotia Car Works (1914) A.C. 922.
- (6) The King v. Board of Commissioners of Public Utilities (1919) 52 Que. S.C. 155, 27 B.L.R. 219.
- (7) City of Wellington v. Borough of Lower Hutt (1904) A.C. 775.

(1) description. But this erroneous interpretation of the fundamental principle of separation of legislative powers embodied in the Act was soon corrected (2) and the Judicial Committee finally asserted in the Liquor Prohibition Appeal, ¹⁸⁹⁶ ~~1895~~ that "since its date a Provincial legislature cannot delegate any power it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from 1.92 other than No. 8". (3) Whether or not the provincial legislature in its exclusive control of municipalities could render them incapable of other duties and powers imposed or delegated, for instance, by the Dominion Government with respect to matters in which it had exclusive jurisdiction was broached in the early case without being answered. (4) It was inevitable, however, that the answer should be none other than that given by the Supreme Court of Canada in Re Prohibitory Liquor Laws, (1895)1 "regulations", said Sedgewick, J. "made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament I think may use existing machinery for this purpose; may

(1) See Clement: Canadian Constitution (3d ed.) 1910 pp. 790 ff. and cases cited.

(2) See Cossey v. The Municipality of the County of Bruce (1877) 1 Cart. 385, 386.

(3) Attorney-General for Ontario v. Attorney-General for the Dominion (1895) 2 C. 310, at 364.

(4) Note (2) supra.

in respect to those subjects committed to it....give to municipal councils power to make by-laws." (1) But the Dominion Parliament cannot add to the capacity of a municipal body corporate powers the local legislature has not already conferred. (2) On the other hand the municipal corporation is not immune to the application of all valid Federal enactments (3) and to regulations made by Federal administrative bodies. (4) "If the legislation is intra vires, municipal corporations are in no different position from natural persons and there is no more difficulty in enforcing compliance with the order of the Railway Committee than in enforcing a judgment obtained against them in an ordinary action". (5)

The point in connection with the municipality as a

(1) (1895) 24 S. C. R. 170, at 247.

(2) Grand Trunk Ry. Co. v. City of Toronto (1900)
32 Ont. R. 110, at 127 ff.

(3) Toronto v. Bell Telephone Co. of Canada (1905)
A.C. 62; Toronto and Niagara Power Co. v. North Toronto (1912) A.C. 834. See Private Control of Public Streets, Canadian Municipal Journal, August 1912 p. 229- Federal Companies and Municipal Rights op. cit. March, 1912, p. 95.

(4) Toronto v. Canadian Pacific Railway (1908) A.C. 54.

(5) Per Oiler, J.A. in In re Canadian Pacific Ry. Co. and County and Township of York, (1908) 25 Ont. App.R. 88, at 73; quoted with approval in Toronto v. Grand Trunk Ry. Co. of Canada (1906) 37 S.C.R. 122, at 238. On the implied obligation of a municipality to the Dominion authorities see Minister of Justice for the Dominion of Canada v. City of Lewis (1917) A.C. 506. On the effort of the Dominion Government to control municipal bond issues as a war measure see Keith:

subordinate agency for the purpose of making by-laws⁽¹⁾ that is the most fruitful^{of} litigation is as to when it is within its statutory powers and when not. Since, as we have just seen the municipality is in its legal capacity entire, the creation of a statute it follows that the only powers which it may exercise are those granted in expressed words, those necessarily or fairly implied in or incident to those powers expressly granted, and those essential to the accomplishment of the declared objects and purposes of the corporation --- not simply convenient, but indispensable.⁽²⁾ A by-law fails when it has no express or implied legislative sanction.⁽³⁾ Should the statute go into some detail as to the subject-matter which a by-law may cover,⁽⁴⁾ or affect the rights of property,⁽⁵⁾ the courts are insistent that the statu-

War Government in the Dominions, p. 302 (Oxford, 1921).

- (1) On the distinction between the legislative and administrative powers of a municipal corporation see Foster v. Reno (1910 22 Ont. L.R. 413, and Wilson v. Town of Ingersoll (1916) 38 Ont. L.R. 280.
- (2) Acular v. City of Winnipeg (1919) 45 D.L.
- (3) Sydney v. Austral Freezing Works Ltd (1905) A.C. 181; Hart and the Municipality of Veaspra and Sunnidale (1858) 13 U.C.Q. B.R. 32.
- (4) Fleming v. Town of Sandwich (1918) 44 Ont. L.R. 114.
- (5) In re Clark and the Municipality of the Township of Howard, (1885) 9 Ont. R. 576.

tory provisions be strictly complied with.⁽¹⁾ But the courts will not assume that the council is trying to evade the authoritating act,⁽²⁾ nor will they squash a by-law because of some slight procedural irregularity unless the method adopted cannot possibly be supported. Mr. Justice Riddell of Ontario has aptly said: "We (the Court) have no right to interfere with them, when they are within their powers, than any other legislative body, parliament or legislature."⁽³⁾

But in deciding when they are within their powers the court may set bounds to the legislative authority of a municipality which they could not fix for a delegative legislature. Thus, if the legislature has given the municipal council power to make by-laws regulating and governing a trade, they cannot prohibit that trade entirely, say the courts, no question of any apprehended nuisance being raised. As the Judicial Committee explained in Toronto v. Virgo (1896) "there is a marked distinction to be drawn between prohibition or prevention of a trade and regulations or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which

(1) A public utility in dealing with a city will also be held to strict compliance with its statutory authority, Toronto Electric Light Co. Ltd. v. Toronto (1917) A.C. 84.

(2) In re Cameron and the Municipality of East Missouri. (1855) 13 U. C. R. 190.

(3) Re Simpson and Village of Caledonia. (1912) 1 D.L.R. 15, 17.

is to be regulated or governed." ⁽¹⁾ To prohibit the city must have statutory authority. ⁽²⁾ Likewise similar authority must be found by a city council before it can delegate any of its powers. Otherwise the delegate is frustrating the legislative intent to rely on a subordinate agency of a certain composition. Whenever, therefore, the city council leaves to another person ⁽³⁾ or group ⁽⁴⁾ an exercise of discretion which the legislature has not manifestly contemplated, the act of the council is ultra vires. (5). If the power of re-delegation is granted the council must not delegate more than it is permitted by the statute. (6).

(1) (1896) A. C. 88, 93.

(2) See Toronto Electric Light Co. Ltd. v. Toronto. (1917) A. C. 84.

(3) Re Elliott (1896) 11 Man. R. 358; Attorney-General and Town of Truro v. Chambers Electric Light and Power Co. Ltd. (1913) 13 L. L. 445, 14 D.L.R. 883; Hall v. City of Moose Jaw (1910) 3 Sask. L.R. 22.

(4) Re Kelly (1887) 13 Ont. R. 451 Regina v. Webster (1888) 16 Ont. L. R. 187; Re Foster and City of Hamilton (1899) 31 Ont. R. 292; Re Cloutier (1896) 11 Man. R. 229; Samson v. City of Montreal, (1903) 13 Que. S. C. 500.

(5) In re MacKenzie and Corporation of Brantford (1884) 4 Ont. R. 382.
Le Campagnie des Chars Urbains de Montreal v. Montreal (1912) 25 Que. S. C. 412, 3 D. L. R. 812.
La Corporation de la Paroisse de l'Assomption v. Forest (1916) 25 Que. L. R. (U.B.R.) 568;
La Communauté des Soeurs de Charite de l'Hopital General de Montreal v. La ville de Chateauguay, (1917) 52 Que. S. C. 3.

(6) In re MacKenzie and Corporation of Brantford, (1894) 4 Ont. R. 382.

(iv) Provincial Governments as Legislative Agencies of the Dominion Government.

A provincial government cannot be called a subordinate agency created by the Dominion Government but whether it might on occasion be employed as a legislative agency is conveniently considered at this point in the progress of our review of the scope of vicarious legislation. We have seen already that there is no difficulty in the Federal Government legislating with reference to past or future enactments of the Provincial Legislature. But Mr. Todd in his Parliamentary Government in the British Colonies has said that it is not competent for the Dominion Parliament "to delegate its functions to the local legislature, so as by absolute grant of discretionary power to enable the local authority to deal with the matter itself"

(1) The difficulty in the minds of those who take this attitude seems to be that legislative power over any subject competent to the Federal Parliament was given to that legislative body exclusively by the British North America Act. Ancillary legislation on such subjects by the Provincial Government would, therefore, be ultra vires. Certainly such a view has been encouraged by the Privy Council. During argument when Canadian Pacific Ry Co. v. Notre Dame Bonsecours, (2) was before the Board, Lord Watson said: "The Dominion cannot give jurisdiction or

(1) 2nd ed. p. 370 (London, 1894)

(2) (1899) A. C. 367.

leave jurisdiction with the Province. The Provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction⁽¹⁾". According-

ly any effort on the part of the Province to legislate on federal matters under the assumption that it had a delegated authority from the Dominion has been defeated by the Courts.

(2) This result has been questioned by an undoubted authority, Professor Lefroy⁽³⁾ and in his Federal System⁽⁴⁾ he cites an Act passed by the Dominion Government which authorized the Province of Manitoba for a period of thirty years to limit rates on a section of the Canadian Northern Railway, under Dominion control parts of which were even in Ontario. This piece of legislation was attacked at the time as being "not in reality, or in substance, an exercise by the Dominion of its powers entrusted to it through the Province as its subordinate agent or representative but an abdication of their authority in favor of the Province and that the right to enact cannot be given or affected by the powers to repeal, which is inseparable from all such legislation".

(1) Quoted by Lefroy: Canada's Federal System p. 70. (Toronto, 1913.)

(2) Reid v. Meldron (1914) 18 D.L.R. 1099 negating Reid v. Reid (1913) 18 S. C. R. 443, 13 D.L.R. 362.

(3) See Lefroy: Short Treatise on Canadian Constitutional Law, 2d. ed. p. 175 (Toronto, 1910).

(4) Canada's Federal System p. 72 1a (Toronto, 1913).

The truth of the matter would seem to be that just as the Dominion, as we have seen, has at times found it practicable to endow municipal corporations with the power to provide ancillary by-laws so it might also employ the existing machinery of provincial governments to supplement Federal legislation in their local jurisdictions. There is no more procedural difficulty in the latter case than in the former. But considerations in the realm of constitutional law must often rise above the question of legality and practicability. No doubt that was what was in the mind of Lord Watson to whom the Canadian constitution owes so much, when he threw out his strong hint during the argument of the Bonsecours Case. In spite of the federal appointment of the Lieutenant-Governor of the Province, or of the power of federal disallowance, every effort of the statesmen of Canada and the members of the Judicial Committee has been put forward to dissipate any notion that the federal system of Canada was a legislative union. The British North America Act hits a happy compromise between such and the loose system of confederation. South Africa may be a legislative union⁽¹⁾ and Australia almost one with its larger range of powers in the central government,⁽²⁾ but the Canadian provinces were finally brought together under a scheme which distributed

(1) See Marshall's Township Syndicate, Ltd. v. Johannesburg Consolidated Investment Co. Ltd. (1920) A.C.420.

(2) See Attorney-General for the Commonwealth of Australia v. The Colonial Sugar Refining Co. Ltd. (1914) A.C.237.

the objective range of legislative authority more truly on the basis of Dominion wide and Provincial interests. The arrangement was eventually acquiesced in by all parties and it would be unconstitutional, in the British sense, to permit any practice to grow up which was contrary to the accepted spirit of the instrument of federation. To hold that the Dominion Parliament cannot delegate to a Provincial Government preserves the genius, if not in fact the substance, of the Canadian Constitution.

The practical advantages of ancillary measures may notwithstanding be easily secured by the device of supplemental legislation by reference on the part of the Governor-General under authority of a Dominion Act as we have already noted in connection with Kerley v. London and Lake Erie Transportation Co.⁽¹⁾ This solution would seem to offer the soundest adjustment of all the interests at stake in the matter..

(v) The Validity of Subordinate Legislation.

Having reviewed various instances where ancillary legislation has been made by delegates of a Colonial Legislature, it is necessary to advert, in closing the topic, to a consideration of how certain attacks on the validity of subordinate regulations have been met. In the first place it was frequently contended in the argument of early cases that the legislature in question was abdicating when it permitted the Lieutenant-Governor or specially created subordinate body to make regulations in place of the law-making authority which had been set up by the Imperial Parliament for that very purpose.

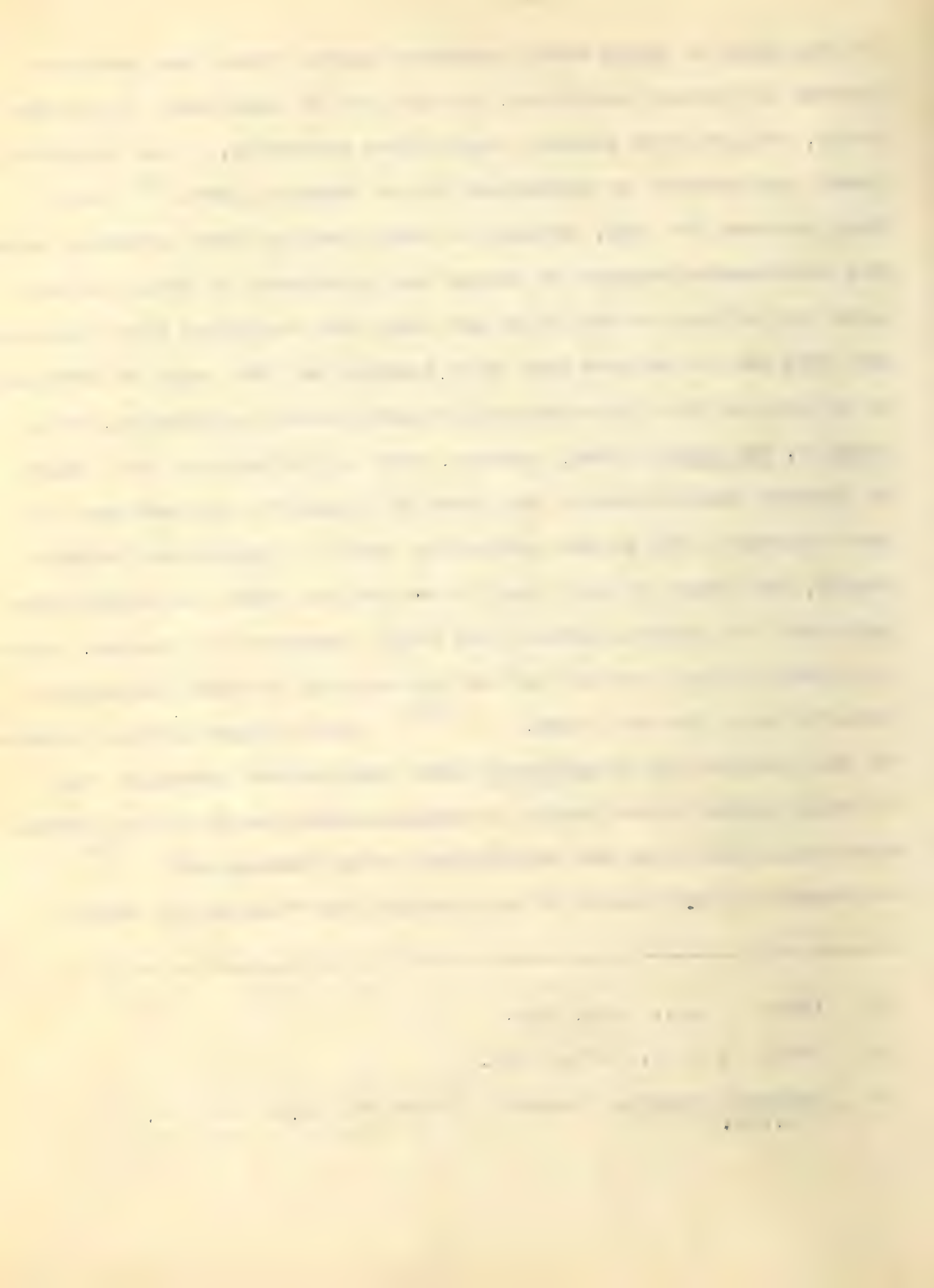
(1) (1912), 26 Ontario L.R. 588 See p. 67, supra.

In The Queen v. Bureh their Lordships agreed "that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by an Imperial Act".⁽¹⁾ But they hastened to add, nothing of that kind had been attempted when the Lieutenant-Governor of Bengal was authorized to bring certain laws into effect at what time and over what territory his discretion saw fit; and as we have seen they tacitly met the point of abdication by explaining that this was really conditional legislation. When Hodge v. The Queen arose, however, with its delegation to a Board of License Commissioners, the force of counsel's argument was much more apparent. But to the contention that the legislature efface itself, the Board replied that it was not so, that the legislature retained its powers, intact, and could, whenever it pleased, destroy the agency it had created and set up another, or take the matter directly into its own hands.⁽²⁾ Lord Fitzgerald who rendered this opinion had in arguendo asked the pointed question: "If it could confer those powers on commissioners, could it not confer those same powers on the Legislature of New Brunswick?"⁽³⁾ His remark in the course of his opinion that "how far it shall

(1) (1878) 3 A.C. 889, 905.

(2) (1883) 9 A. C. 117 at 132.

(3) Sessional Papers, (Canada), (1884) vol XVII, no. 50, p.110.



seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the courts of law, to decide", would seem to indicate that a line, would, in fact, be drawn somewhere by the courts. If the agency is subordinate, one created by the legislature, and amenable to its control in a manner that the government is not, then there is no constitutional objection to a body of the well settled plenary authority that a Colonial Parliament is accorded, delegating a measure of its functions. The function of a law-making organ of the state is the exercise of discretion within the limits of its constituent authority. If there is any abdication in leaving to administrative agents the formulation of regulations or by-laws, it is in the matter of delegation discretion. There is no foregoing of constitutional power. The legislature may not deliberate on the efficiency or wisdom of the precise requirement of particular regulation but it does retain complete control over all the elements which bring about its formulation and thereafter insure its enforcement. Most acts of the legislature itself really stand on much the same ground as any regulation. A committee inquires into the regulation of the measure and makes its report to the house, and when the act is passed no one would question its validity for the reason that every member of Parliament had not given it his unalloyed deliberation. The opportunity to deliberate suffices. And so with administrative agencies; as long as Parliament determines the personnel that applies the

necessary mental processes, and as long as it determines the scope and endurance of a regulation, there is hardly any force in the impeachment of such instances of vicarious legislation.

But a point of attack on subordinate legislation of more constitutional import was raised by Sir Barnes Peacock during the argument of the same case of Hodge v. The Queen. His Lordship pointed out that regulations and laws made by administrative agencies especially those in this case which provided for a punishment of hard labour for a breach of them, would escape that assent of the Lieutenant-Governor which was required before any act of the legislature itself became valid. It will be remembered that it was because the Manitoba Initiative and Referendum Act purported to permit the making of laws to which such assent had not been given that the Privy Council had declared it ultra vires. However, the Board, in 1878 were apparently satisfied with counsel's argument for no further reference was made to the matter in the course of their delivered opinion. The argument was that when the Lieutenant-Governor assented to the Act by which the commissioners were empowered to make rules and regulations, he assented to the rules and regulations which they might make and also to an infraction of those rules being treated as an offence against the law of the Province. (1) The same argument did not save the Manitoba

(1) Sessional Papers, (Canada), (1864) Vol. XVII. No. 30, p.113.

Act, however, for reasons which we will postpone to the discussion of our next topic. Plausible as such an argument sounds one cannot help but feel that their Lordships were really satisfied to pass over this evasion of the executive assent in view of the many practical advantages to be secured by the employment of such subordinate agencies. "It is obvious that such an authority", the Board said in their decision, "is ancillary to legislation, and without it, an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail".

With the increasing complication of the economic world and the gradual acceptance by society of paternalism on the part of governments, the resort to administrative agencies with large legislative authority has been very marked in recent decades. Some are even apprehensive that we are entering an era of government by commission. (1) However that may be from The Queen v. Burah the colonial legislatures of the British Commonwealth have travelled by the gradual stages we have reviewed above to the extreme instance of vicarious legislation in Roche v. Kronheimer and the courts have not as yet called a halt. The layman could hardly be blamed for accusing the courts of indulging in legalistic subtleties when they contend that in some of the recent War Measures and Treaty of Peace Acts, the legislature has in no way abdicated its funct-

(1) See Constitutional Safeguards - How Far Can Delegates delegate. (1919) 55 Canada Law J. 366.

V. Constitutional Limitations on
Vicarious Legislation.

ions.

The extent to which the device of vicariously legislating through subordinate agencies has been employed in recent years incites one to divulge in the fascinating speculation of what are the constitutional limitations that bound its future use on the part of colonial legislatures. Between the easily accepted delegation in The Queen v. Burah, (1878) and an out and out abdication, where is the line to be drawn? How far must we adhere to the dictum, in The Queen v. Burah and its reiteration by Viscount Haldane in the Initiative and Referendum Case (1919), to the effect that a colonial legislature, plenary as its powers may be in the eyes of the Judicial Committee, cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence?" Apparently it is the view of the Board that a colonial government cannot extinguish itself and set up another authority in its place to take full control of the legislative field.

Let us assume for the moment that such a proposition is sound. How far then could a legislature go in delegating a law making power to another body while it continues itself in full authority? Professor Harrison Moore has asked the question "would it be lawful to commit to, say, a Royal Commission full powers to make laws for the peace, order, and good government of the colony in all cases whatsoever, subject to the limitation that any law made by such commission inconsistent with

any act passed by the legislature, shall be invalid, and that the Commission may make no law which relates to the constitution or powers of the legislature itself?"⁽¹⁾ He claims that the actual decisions of the Privy Council would not support such a step and he interprets the dicta referred to above as actually denying it. He is nevertheless inclined to believe that such a delegation would be valid, the only difficulty to his mind being the resultant invasion of the Crown's power of disallowance. But he considers this objection to be more political than legal which is illustrative of the Australian attitude of mind on any question involving the Crown. He submit, however, that the decision and dicta do not necessarily preclude the creation of a Royal commission having authority in the terms which he suggests. It is too broad an interpretation of the famous dictum of Lord Selborne in The Queen v. Burah to say that he intends it to have reference to such a Royal Commission. His Lordship said as we have noted before, that the Indian Legislature "could not by any form of enactment create in India and arm with general legislative authority, a new legislative power not created or authorized" by an Imperial statute. Did not their Lordships in 1878 have in mind an abdication of the general power of legislation, "an attempt" as Sir Arthur Hobhouse put it in interpreting this dictum during the argument of The Queen v. Hodge," to pass the subject

(1) Moore: The Powers of Colonial Legislatures in The Journal of Comparative Legislation and International Law (1922) 3d ser. vol. IV. pt. 1, p. 11 at 14.

power beyond the legislature constituted by Parliament?

"It must remain vested" he added, "with the responsibilities and authority?"⁽¹⁾

Again we submit, that the dictum of Viscount Haldane in the Initiative and Referendum Case does not support the claim of the learned Professor. It will be noted that in asserting that there is no doubt as to the validity of the employment of subordinate agencies by a legislature, Lord Haldane's qualification is, "while preserving its own capacity intact". It is, therefore, reasonable to assume that when he subsequently addressed himself to the gravity of the constitutional question raised, should a legislature seek to establish "endowed with its own capacity, a new legislative power", he must have had in mind the complete effacement of the existing constituent body. It is this interpretation which gives point to the decision in the Initiative and Referendum Case. The Privy Council could not have taken exception to the device of the initiative and referendum per se for the latter at least has been approved of in the decision of Russell v. The Queen, (1882).⁽²⁾ What they felt to be unsupportable was the handing over to the electorate complete authority to make a law that had not been deliberated upon by the legislature nor received the assent of the Lieutenant-Governor. "If the Act is valid", the Board said, "it compels him to submit a proposed law to a body of voters totally distinct

(1) Sessional Papers (Canada) (1884) vol. XVII, No. 30 p.110.

(2) 7 A.C. 829. The initiative has been approved in The King v. Nat. Bell Liquors, Ltd. (1922) 2 A.C.128: see p.39 supra.

from the legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of the voters." True the legislature continued to exist but it could not in any reasonable sense be said to assume the responsibility or authority for statutes passed by means of the machinery set up by this act, for it had handed back to those to whom it was in fact accountable the power to put laws on the statute books. We may conclude, therefore, that a delegation by a continuing legislature under conditions which nullify its functions in the making and altering of laws or eliminate in substance its responsibility as a representative body, is to be considered as exceeding the power of a colonial legislature plenary as its powers may be. But there would seem to be no reason to doubt that any delegation short of that meets with the approval of the custodians of the written principles of self-government throughout the British Commonwealth beyond the seas. If written authority be desired it will be found in S. 5 of the Colonial Laws Validity Act of 1865, -- "every representative legislature shall havefull power to make laws respecting the constitution powers and procedure of such legislature".

The legitimate bounds of an inquiry into the topic of vicarious legislation are exceeded when we advance into any discussion which assumes the discontinuance of the delegating

body. But in view of Lord Haldane's drawing attention in the Manitoba Case to the gravity of the constitutional question raised should a legislature attempt to abdicate, a brief reference to the point will conclude our present topic. Professor Dicey has asserted that it was quite within the competence of the Imperial Parliament as a sovereign body to abdicate (1) just as an autocratic Czar might abdicate. This may be done, he says in two ways: First, it may legally dissolve itself and leave no means whereby a subsequent parliament could be legally summoned. How far does this apply to a colonial legislature? Obviously were a colonial legislature to attempt to do the same thing it would amount to a declaration of independence, in other words, a declaration that it was itself a sovereign legislature. This of course is in spite of the words of The Queen v. Burah that it has "plenary powers as large and of the same nature as those of Parliament itself". When St. Vincent and Grenada wished to surrender their autonomy to the Imperial Parliament in 1876 it was necessary to do so of themselves, as Scotland did when it chose to join with England in forming the United Kingdom.

Professor Dicey says that in the second place a sovereign body may extinguish itself by transferring its sovereign authority to some person or body of persons. How far may a colonial

(1) Dicey: Law of the Constitution. 8th ed. p. 66. fn. (London, 1915).

(2) 39 and 40 Vict. c. 47.

legislature transfer to a successor such plenitude of powers as it possesses and thereafter cease to function itself?

Sir Arthur Keith cites the instance of the legislature of the Virgin Islands by a local act endowing with its authority the Governor of the Leeward Federation of which they formed a part and maintains that the Governor does not thereafter legislate by virtue of the prerogative but as a successor endowed with all the powers which the former assembly possessed.⁽¹⁾ It is difficult to see how this is consistent with S. 5 of the Colonial Laws Validity Act quoted above. As Professor Moore points out in his article already noted, "a valid exercise of the authority given by S. 5 must be directed to the constitution of the legislature; but, as the qualification for the exercise of the power is the representative character of the legislature, and as the subject-matter is the constitution, powers and procedure of such legislature, it is not unreasonably inferred that the maintenance of this representative character is somewhat fundamental:" The Governor of the Leeward Federation is certainly not a "representative legislature". Yet Sir Arthur Keith would hold further that he might change his own composition as a legislature for the Virgin Islands under the authority of this section, and he adds that the same power rests in the nominee body to which the local legislature has been reduced in British Honduras, Antigua, Dominica and other places,

(1) Keith: Responsible Government in the Dominions, vol 1, p. 366. (Oxford, 1912).

If Professor Moore's interpretation of S. 5 of the Colonial Laws Validity Act, is sound, it is difficult to account for these actual instances of a colonial legislature clothing with its powers a successor not provided for by any Imperial Act. One is tempted to submit that S. 5 only applies when a continuing representative legislature is actually re-modelling its own constitution, but that when the legislature is extinguishing itself in a way similar to the second method which Professor Dicey suggests in respect to covering legislatures the matter has advanced beyond the scope of S. 5 and becomes a non-statutory constitutional question. It is to be observed that the step taken by the Virgin Islands, British Honduras and others was quite voluntary on the part of the local autonomous community. One may assume further that it was highly convenient and in the interests of all concerned so that once again it is possible that the force of circumstances is at work on the constitution of the Commonwealth in its far flung self-governing dominions.

Perhaps colonial legislatures are entering on a day when they are to be allowed by a nascent convention of the constitution almost complete sovereign attributes. One can readily appreciate that the Imperial Government could not tolerate a local legislature insisting upon having the power to dissolve itself and foreclose the possibility of a future government within the territory. That would be tantamount to proclaiming the Empire a dissipated creature. But it is highly con-

ceivable that, short of severing any federal link which the Imperial Parliament has provided, the local community may do with its government as it sees fit, and, in fact, have it transfer its powers to ~~some~~ person or persons not contemplated by the Imperial Authorities at the time of the grant of self-government.

This indeed would seem to be the impossibility in the Canadian Provinces. The British North America Act S. 92, provides that "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say, ⁽¹⁾ The amendment from time to time, notwithstanding anything in this act, of the constitution of the Province, except as regards the office of Lieutenant-Governor". The term "exclusively" must be taken to apply to the subjects enumerated and not to the legislature. Lord Haldane's assertion in the Manitoba Case that the Act "entrusts the legislative power in a province to its legislature, and to that legislature only" would appear to be too strong especially in view of the generality of the first sub-section. Provided the federal link is not interfered with, there seems to be no reason why a local legislature cannot constitute with its authority any person or persons whom it sees fit to succeed it. The defeat of the Initiative and Referendum Act by the Judicial Committee was actually put on the ground that the federal link had been severed. The case itself may easily rest on that ratio decidendi. One is left free to question, therefore, the force of Lord Haldane's dictum that a provincial legislature cannot "Create and endow with its own capacity a new

a new legislative power not created by the Act to which it owes its existence".

PART III.

JUDICIAL REVIEW OF THE GOVERNOR
AS AN ADMINISTRATIVE AGENCY.I. Review of the
Exercise of the Prerogative and
Acts of State.

The prerogatives of the Crown run throughout the Empire except where they have been limited by an Imperial statute (1) or a local law. In some instances their exercise has been delegated to the Crown's local representative, the Governor. Although it is well settled that in the self governing Dominions (2) he acts only on the initiative and advice of his Ministers, yet there is apparently one exception to this convention of the constitution. In exercising the delegated prerogative to pardon offences the Governor-General of Canada need not follow the advice of his Ministers, (3) and in fact in one case where he granted a pardon his council abstained from giving him any advice whatever. (4) No review of the exercise of this pardoning power may be obtained in the courts. As the Judicial Committee said in Balmukand v. The King-Emperor, (1915) (5), "the tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside their Lordship's province".

(1) The Queen v. Bank of Nova Scotia (1885) 11 S.C.R.

(2) Theodore v. Duncan (1919) A.C. 676. at 706.

(3) See the authorities collected in Lefroy: Short Treatise on the Canadian Constitution, p. 168 (Toronto, 1918).

(4) See 32 Canadian Law J. 53.

(5) (1915) A.C. 629, 630.

Another prerogative of the sovereign that may be delegated when necessity demands to its overseas representatives, is the power to make war and peace. No colonial government would have power to declare war or make peace without such delegation. The King alone had the authority to place his Dominions in a state of warfare, or delegate the power to do so. (1) War otherwise declared would not commence a legal state of hostilities. (2)

The power to take necessary measures in time of war may also be and generally is entrusted to a local authority. The courts will not sanction any re-delegation of this royal war prerogative. Neither the exercise of the power nor the discretion to judge of the necessity for its exercise can be re-delegated. (3) But the courts will refuse to review any decisions made under this power by the proper authorities on what are necessary measures to meet the emergency. As the Judicial Committee explained in the case of The Zamora, in prize: "those responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of Law or otherwise discussed in public". (4) Similarly acts done by the military authorities cannot be adjudged as to their propriety before a man-

(1) Re Kok (1879) 9 Buch. 45.

(2) The Dart (1812) Stewart 301.

(3) Joseph v. The Colonial Treasurer of New South Wales.
(1916) 25 C.L.R. 32.

(4) (1916) 2 A. C. 77, at 107.

(1)

icipal court,

(2)

The courts will not review an act or matters of state. To quote the language of Lord Kingsdown as to the reason for such a rule:- "of the propriety or justice of that act neither the court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion, It may have been just or unjust, politic or impolitic, ^{Now, Now!} beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy." (3) But where the Crown attempts to justify an interference with the private rights of its subjects as an act of state the court will grant relief.

(4)

Unless some recognized legal principle can be invoked the Court cannot entertain the suit. Thus in Dominion of Canada v. Province of Ontario, 1910, (5) a treaty had been made by the Dominion whereby certain payments were guaranteed the Ojibway Indians in return for their releasing all interest in a large tract of land the most of which lay in Ontario and thus enured to its benefit. (6) The Dominion claimed that

(1) Ephinstone v. Bedreechund (1839) 1 Knapp, P.C. 316.
Ex parte Marais (1902) A.C. 109.

(2) On the nature of an act of state see Haleigh v. Goschen (1898) 1 CH. 73.

(3) Secretary of State of India in Council v. Kamachee Boye Sahaba (1859) 13 Moo. P.C. 22, at 56, See also acc. Cook v. Sir James Sprigg (1899) A. C. 572.

(4) Walker v. Baird (1892) A. C. 491.

(5) 1910 A.C. 837. (6) St. Catharines Milling & Lumber Co. v. The Queen (1889) 14 A.C. 46.

the Province should pay a proportionate share of the treaty obligations. The Judicial Committee held that although as a matter of fair play Ontario might be liable for some part of the outlay, there was no point of law involved in the case. Similarly the court refused to take cognizance of a case involving a grant of land by treaty to be held on political tenure. The Board held that the question to whom the land shall be granted on the death of its holder was one which belonged exclusively to the government to be determined upon political considerations, and it was not within the competency of any legal tribunal to review the decision which the government might pronounce. (1)

11. Review of Proclamations, Orders and Regulations in Council.

In Sir John Sprigg v. Sigcau (1897), where the Governor of Cape Colony was authorized to add to the existing laws of Pondoland which had just been annexed, such laws as he should from time to time by proclamation declare to be in force, it was argued that a proclamation issued on such authority was an act of State and that the courts could not therefore review the matter. But this was denied by the Judicial Committee, and they held that it was a delegation of legislative authority over which the court must take cognizance in order to ascertain if the Governor had acted within the scope of that authority.

(1) Shekh Sultan Sani v. Shekh Ajmodin (1892) 20 L.R. Ind. App. 50.

(2) (1897) A. C. 238.

If an expressed or implied authorization is found then the courts cannot question the discretion of the Governor relied on in this type of so-called conditional legislation where certain details are left to the executive. If a Customs Act including among prohibited ^{imports} reports "all goods the importation of which may be prohibited by proclamation;" then a decision of the Governor's that opium suitable for smoking shall not be imported is valid and unimpeachable before the courts.

(1) Over the wisdom of the delegating statute itself the Court of course has no power of review. As Lord Selborne said of similar legislation, in The Queen v. Burah, 1878, "if what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition restriction by which that power is limited (i.e. any Imperial act), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions or restrictions." (2)

Accordingly when an act of the legislation leaves to the Governor to fix the time when the Act is to come into effect the courts will not permit his postponing such period from time to time, for to do so would in effect amount to assuming "a delegation by the legislature of its authority to repeal and re-enact or extend or fix the time for the Act to come into force and that from time to time." (3) But, as Lord Loreburn said in

(1) Baxter v. Ab Ray (1909) 8 C.L.R. 416.

(2) (1878) 3 A. C. 889. 906.

(3) Cape and Taylor v. Scottish Union and National Ins. Co. (1897) 5 F. C. R. 329.

(4) Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571, 583.

Supra
Court Reference Case: "it cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no court has a word to say."⁽¹⁾

So also as to orders in council: the jurisdiction of the court is merely to see that the governor has acted within the scope of his delegated authority. Any order beyond such authority is ultra vires and, therefore, void.⁽²⁾ But the courts are free to construe only the statute under which an order is made to ascertain the power of the Governor; they cannot entertain an argument that he has no occasion which justifies his order. The court cannot go beyond an enquiry as to whether the order complies with the requirements of the Act; it cannot call for the materials or examine them.⁽³⁾ Accordingly in Powell v. Apollo Candle Co., 1885, where a statute empowered a Governor to levy a duty at a fixed rate on any article imported, which, "in the opinion of the collector or commissioners", was a substitute for a dutiable article, the Judicial Committee held that the opinion of the collector, whether right or wrong, authorized the Governor to take action.⁽⁴⁾

Regulations made by the Governor within the scope of his statutory authority invoke the same principles on review in the courts. Authority for any regulation must be found within.

(1) Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571, 582.

(2) Perlman v. Piche (1918), 54 Que. S.C. 170; 41 D.D.R. 147.

(3) Re Jawa Nathoo (1916) 20 Calcutta W.N. 1327.

(4) (1885) 10 A.C. 282.

the Act and all conditions imposed by the legislature must be strictly complied with; otherwise it is ultra vires.⁽¹⁾ If everything necessary has been performed, so that there is no irregularity,⁽²⁾ and the regulation is intra vires, then it cannot be questioned in any proceeding whatsoever.⁽³⁾ The Governor in making regulations, like the legislature in passing statutes, must be taken by a court of law, to use Lord Halsbury's phrase, as "an ideal person that does not make mistakes."⁽⁴⁾

III. Review of Fact Finding and Other Administrative Action

Statutes are legion and increasing which leave to administrative agencies the taking of certain action or the creation of certain rights upon their finding of fact. To what extent and in what way the procedure of such agencies in this task shall be subject to review by the courts, the common law is still endeavoring to ascertain. The wholesale resort by the legislatures to administrative agencies is too recent for one to say that the law has as yet crystalized, and in view of the still unexplored possibilities of this new hybrid creature, the administrative agency, it is as well not to force or expect the law to be settled.

(1) Chappelle v. The King (1904) A.C. 127.

(2) Ince v. Thorburn (1886) 11 A.C. 180.

(3) Addar Khan v. Mullins (1920) A.C. 391.

(4) Commissioners for Special Purposes of Income Tax v. Pemsel
(1891) A.C. 531, 549.

Upon the shoulders of the Governor a great deal of this supplementary work has been cast. The most plausible explanation of this is that, since by a convention of the constitution he must act in council, which is in most cases dominated by the cabinet and political department heads, his administrative work can be directed and controlled by those responsible for turning the wheels of government. The Governor really symbolises those who sit in his council and run the government. It conduces to the ease with which this is accomplished from day to day if the legislature debates and enacts a general policy and then leaves to its leaders who guide the executive the more arduous task of delineating the particular instance where the effect of the statute is to be applied. If the finding of certain facts are necessary, a host of trained civil servants may be relied upon to secure the necessary information; but the responsibility for any action taken thereon rests with those who also must be ready to defend the statute before the country as a piece of their legislation while in office.

↳ A brief review of the cases where such administrative work is left to the Governor in Council will indicate the state of the law at the present time. When a finding of fact is left by the legislature to the Governor in Council can his decision be questioned by a court of law? This point was neatly raised in Wijeyesekera v. Festing, 1919⁽¹⁾ An Acquisition of Land Ordinance of Ceylon provided that "whenever it shall appear to the Governor that land in any locality is

(1) (1919) A.C. 646.

likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor-General or other officer generally or specially authorized by the Governor in this behalf, to examine such land and report whether the same is fitted for such purpose. The Surveyor-General or other officer so authorized, as aforesaid, shall then make his report to the Governor, whether the possession of the land is needed for the purpose for which is appeared likely to be needed as aforesaid. And upon the receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government Agent to take order for the acquisition of the land." The procedure prescribed in the Act was duly carried out and the Governor on the advice of his council found that the land was wanted for a public purpose. The appellant whose land was affected by the acquisition order contended that he was entitled to challenge in a court of law the decision of the Governor on the question whether his land } was needed for public purpose. Lord Finlay held, however, in the Privy Council that the decision of the Governor was final, and was intended to be final, and could not be questioned in any court. There is no available record of the nature of the report made by the subordinate official to the Governor. As the land was actually used for the making of a highway, and the appellant did not object to His Excellency's decision on the ground that it varied from the submitted report, although it is not certain that the owner knew the contents of the report, one may reasonably suppose that the

report had held as the Governor himself did finally. It is not clear from the wording of the Act whether the Governor must accept the finding of the official after his examination of the land and the purpose for which it was needed. The Judicial Committee, however, approved a decision of the Supreme Court of Ceylon that the Governor in Council had full discretion and that he was not bound to take the report of the ~~Governor~~^{Deputy}-General as to the fitness of the Land or the necessity of its acquisition for a public purpose.⁽¹⁾ Whether land is needed for a public purpose is obviously a matter which in the nature of things can really only be decided by either the legislative or executive branch of the government. It is a political not a judicial question. It seems proper, therefore, to allow those who must stand responsible to the community for their action to be unfettered by the finding of any subordinate official. The guarantee that private rights will not be improperly invaded becomes political rather than judicial for the council who in fact make the decision for acquisition are responsible to the legislature. The latter has provided that a certain official, who is in general well suited to the task, must first make a report before the Governor acts, and they are able at any time to call for the report so made and interpolate the executive on their action upon it. All that a court can fittingly do is to see that the officials named in the statute comply strictly with its terms. For a further safeguarding of his interests the

(1) Government Agent v. Perera (1903) 7 Ceylon N.L.R. 313.

plaintiff must look elsewhere. The court is not the sole guardian of private rights.

That hardship on the plaintiff will not move the court to depart from its rule of strict compliance with the statute was apparent in the decision of Newfoundland Steam Whaling Co. Ltd. v. Government of Newfoundland, 1904.⁽¹⁾ An Act of the legislature, providing for the regulation of the whaling industry, in April, 1902, empowered the Governor in Council to issue licenses and stated: (1) no license can be issued until the site of the factory shall have been approved by the Governor in Council; and (2) the license must define the area to which it is to apply. The plaintiff's factory was practically completed when the act was passed and during the season of 1902 he carried on whale fishing without having applied for a license. In November of the same year the government requested him to make such application, which he did and paid the necessary fee. A receipt was given, signed by the Minister of Marine and Fisheries, describing it "as a whaling license fee for a factory operated at Rose-au-Rue being the amount due for 1902." In the following spring the plaintiff paid another fee of \$1500 but it was not until the fall of that year that any formal license was issued by the Governor. This license contained the following inscription: "This certificate is to supersede and takes the

(1) (1904) A.C. 399.

place of the license which the within-named licensee holds in the form of a receipt and under which he has carried on his business." The license so granted defined the area within which it was to operate, and the area so defined was narrower than that described in the plaintiff's original application. The plaintiff had relied on the Governor's approving the area desired and alleged that they had spent large sums in permanent works on their factory and had continued operations at the Rose-au-Rue site instead of moving elsewhere. But the court would not revise the license and alter the area defined by the Governor. A mere receipt could not take the place of a license. The Board said, per Sir Arthur Wilson: "The system of licenses and the machinery for carrying it into effect are created by the statute, and, as in all such cases, the provisions of the statute must be complied with. The license must be granted by the Governor in Council and it must contain what the Act requires." The Board told the plaintiff that the real source of all his inconveniences had been his carrying on business after the passing of the act without taking proper steps to comply with its terms. But not a little of his troubles could be laid at the door of a tardy administrative official against whom, if he had known that an unfavorable Governor's decision on the extent of the area in which he would be allowed to operate was final, he would in all likelihood have brought mandamus. [One is well advised in dealing with government officials in any case to protect his interests by his own diligence so far as it will avail. -]

In holding the Governor to comply with the enactments of the legislature the courts will not permit him, unless so authorized, to indulge in findings which are in substance decisions on points of law. Thus in Perry v. Clissold, (1907)⁽¹⁾ an appeal in the Judicial Committee from the High Court of Australia, there was involved a statute of New South Wales which permitted the Governor to sanction the acquisition of land for public purposes. The act further provided that every estate and interest in the land upon notice of its resumption should be taken as having been converted into a claim for compensation. The respondent had been a squatter on land resumed under the statute for a school site, and the Governor refused to entertain his claim for compensation, alleging that he was a mere trespasser. But the court held that a prima case for compensation had been disclosed in that the respondent had a possessory title, good at the date of resumption, against everyone but the rightful owner, and in course of becoming absolute as against him. The Board said that the Act could hardly be construed as permitting the Governor to "take advantage of the infirmity of anybody's title in order to acquire his land for nothing." Again in Eastern Trust Co. v. McKenzie, Mann & Co. Ltd., 1915,⁽²⁾ the Judicial Committee laid down the proper course for the executive when certain of its decisions involved points of law. In that case the Legislature authorised the Governor

(1) (1907) A.C. 73.

(2) (1915) A.C. 750.

to make payments on contract when satisfied that claims for labour and supplies under it were due and owing. The Board held that the discretion given the executive could not be taken to oust the jurisdiction of the court to determine as a matter of law when the claims were due and owing under the contract. "The non-existence of any right to bring the Crown into Court," said their Lordships, "does not give the Crown immunity from all law, or authorize the interference with private rights at its own mere will. . . . It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it." Colonial executives will do well to recall Lord Abinger's remark in Deane v. Attorney-General, 1835: "It has been the practice, which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice where any real point of difficulty that requires judicial decision has occurred."⁽¹⁾ It is only by establishing and continuing such practices that the work of administrative officers will both in fact and in the mind of the individual protect his interests as they are now secured by a court wherever it may take jurisdiction.

(1) (1835) 1 Y. and C. 197, 208.

Although the Governor cannot in the exercise of discretion given him obviate a review of any decision of his on a point of law, there are many of his determinations in a growing administrative field which cannot be challenged in a court in spite of the fact that they are reached after his conducting an inquiry which has all the earmarks of a judicial proceeding. There is very little of the judicial atmosphere to a determination of when land is needed for a public purpose, or of how large an area should be granted to a whaling industry; these are matters politic, affairs of state, in which one expects the individual's interests to be sometimes rudely dealt with in view of the paramount interests of the community. But when the Governor is empowered to remove an official from office for due cause, or to proclaim a forfeiture of a land grant, or to decide a matter inter partes, and so forth, one cannot help but feel that the individual's interests are now as much to be considered by the Governor as any other interests at stake. A certain nice balancing is required. It is reasonable to expect that the information will be properly collected and duly weighed before a decision is reached. In short the Governor has before him a task which we have been accustomed to see attached in a court of law and one wonders whether the experience that has crystallized there in the course of centuries may be entirely disregarded by His Excellency when he dons the robe of an administrative judge. How far are his acts in this new and peculiar capacity amenable to review by the courts of the common law? If such review is not in the fullest sense satisfactory, then where are we to look for the sanctions for the development and retention of

due administrative process?

The courts have insisted in the first place that the parties affected by an exercise of the Governor's discretion in such cases shall be given proper notice. Thus in Minister of Mines v. Harney, 1901,⁽¹⁾ the Governor of Western Australia was permitted by an Act and the regulations made thereunder to forfeit the lease of a gold field after the hearing had been held and report made to him by the warden. Notice of the Governor's decision to act on the report of the warden that the lease be forfeited was forwarded to the latter's office where it lay unheeded. The Judicial Committee held that so long as this decision laid dormant in that office, and no notice was given to the lessee, and the land was not declared vacant by some other overt act of the Governor, it was not an unequivocal or irrevocable expression of the Governor's will.

Not only notice the courts say but a fair opportunity to be heard must be accorded the individual whose interests are subject to the discretionary action of the Governor, when the legislature does not prescribe any other procedure. Before any of the modern administrative tasks of the chief executive became a topic of concern to the courts, he was frequently entrusted with the duty of a somewhat similar nature, namely, the removal from office of appointive public officers and civil servants. It has long been settled in such cases that the party affected should be given due notice and a fair opportunity to be heard on his own behalf in answer to the charges

(1) (1901) A.C. 347.

on which the Governor purported to base his action. Thus in Wills v. Sir George Gipps, (1846)⁽¹⁾ the Governor and Council of New South Wales was by statute authorized to remove any person from any office in case of neglect or misbehaviour. Sir George Gipps, as Governor, brought before the Executive Council certain complaints against the plaintiff, a Judge of the Supreme Court, for alleged misbehaviour in office, and the Council deliberated on the matter for several days. The first occasion on which the plaintiff knew of these proceedings was when he received official notification that after mature consideration the Council had advised the Governor that the Plaintiff had misbehaved himself in office and that his appointment was accordingly revoked. He appealed to Her Majesty and the Judicial Committee advised that the order of removal should be reversed on the ground that the Governor and Council ought to have given the appellant some opportunity of being previously heard. The court will not attempt to revise the decision of the Governor in his finding of fact and exercise of discretion, but they will insist that the interested party has his ^say before the executive tribunal.

It has been equally well settled for colonial administrative agencies upon whom has been imposed by comparatively modern statutes the duty of determining various kinds of questions involving private rights, that a fair opportunity to be heard must be given any party to the controversy. This

(1) 5 Moore P.C. 379.

was decided in the same year as The Queen v. Barah⁽¹⁾ the leading case on the delegation by the legislature of its law-making authority, by Smith v. The Queen, 1878,⁽²⁾ which came up to the Judicial Committee from the Supreme Court of Queensland. The Crown Lands Alienation Act of the colony provided that "the lessee of any agricultural or pastoral land... shall reside on such ~~selection~~ continuously and bona fide during the term of his lease, provided that if at any time during the currency of a lease it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his ~~selection~~, etc., it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated." Further; "All questions shall be decided by the Commissioner, who shall give his decision in open court,⁽³⁾ subject to confirmation by the Governor in Council." In 1874 the Commissioner informed the appellant in writing that evidence had been brought before him to the effect that he had not carried out the conditions of residence and he requested him to show cause at the next Land Court (so called) why his abandonment should not be reported. Mr. Smith's solicitor duly appeared and asked to see the evidence against his client, but the Commissioner replied that the evidence, or a portion of it, had been forwarded and could not be produced. The Com-

(1) (1878) 3 A.C. 889.

(2) (1878) 3 A.C. 614.

(3) This term is used to describe the required sitting of the Commissioner at the Land Office. It was not a court of record.

missioner told the solicitor he was ready to receive and consider any evidence on behalf of his client, to which the solicitor replied that he could not meet evidence the nature of which he did not know. The Commissioner reported that the land should be forfeited and the Governor issued a proclamation accordingly. In an ejectment suit the jury found for the Crown on the question: Was it proved to the satisfaction of the Commissioner that the lessee had abandoned his selection? The Supreme Court refused to set aside the verdict. Their decision was reversed, however, by the Privy Council. Sir Robert Collier held that the appellant had not been heard in the sense in which a "hearing" is "required by the elementary principles of natural justice. The Commissioner acted doubtless with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature.... The defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term. It is true that he was summoned to answer general charges of non-residence and abandonment, but a summons to answer charges the evidence in support of which is withheld appears to their Lordships as illusory."

That an interested party to an administrative action of the type we are considering has had a fair opportunity to be heard when the charges and evidence against him is placed at his disposal for refutation, was held in the recent case

of De Verteuil v. Knaggs, 1918,⁽¹⁾ the defendant being the acting Governor of Trinidad and Tobago. An ordinance had been passed for the protection of the immigrants in those islands, which empowered the Governor to transfer indentures to another estate, if at any time it appeared to the Governor, "on sufficient grounds shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom."

In December of 1916 the Protector of Immigrants holding office under the statute, reported to the Governor on the immigrants indentured to Mr. de Verteuil that: 1. They were not receiving proper medical attention; 2. They were dissatisfied because of their isolated condition; 3. The number of prosecutions of immigrants was a certain percentage.⁽²⁾ The trial court found it to be higher than the correct figure and the Protector of Immigrants admitted that he did not go into the facts submitted later by the appellant and reach the proper percentage until long after the Governor's decision, in fact not until the figure was required for the Governor's affidavits in this suit. Whatever the percentage before the Governor, the report intimated that it was high. 4. That the percentage of failures to earn sixpence per diem

(1) (1918) A.C. 557. See 2 Trinidad and Tobago 441 for the nisi decision and *ibid.* 453 for the judgment in the Supreme Court of Trinidad and Tobago.

(2) The figure is not given in any report of the case.

was 66. The trial judge found and the Protector admitted, that the correct figure was 50 per cent. The Protector's report, however, was never altered for the Governor who had from the former only a figure which, as the court said, represented a very much worse state of affairs than actually was the case. Upon the receipt of this report the Governor issued an order for the removal of the indentured immigrants from the appellant's estate, and the first intimation he received was in a letter he received four days later. This informed him of the grounds on which the Governor had found it necessary to act, and in the case of the last two items, instead of giving any definite figures, the Protector only intimated that the percentages were high. The appellant immediately requested the Governor for an interview and as a result His Excellency invited him to send in in writing what he alleged to be the proper facts as to the prosecutions, this being apparently the only item which was considered during their conference. No actual figures were advanced by the Governor and the appellant did not ask for them. The latter, however, wrote a long letter giving particulars tending to show that the authorities had arrived at their figures on a wrong basis and that further inquiry was necessary. The Protector went into the figures again but at the trial admitted that he could not even with the appellant's figures before him work out the correct percentage as he did not know exactly the average number of immigrants on the estate during the year. It could not have been certain at that time that the figure in the mind of the Governor was accurate and yet apparently no effort

was made by the Protector to correct any impression it might have made on him. The reply sent to the appellant was that the appellant's letter had received careful consideration, but that, "in view of the report of the Protector of Immigrants, His Excellency regrets that he does not feel justified in cancelling the order." Whereupon Mr. de Verteuil demanded a copy of the report, which the Protector had submitted to the Governor and this was duly forwarded to him. There resulted a further investigation of figures and more correspondence until March 15, 1916, without the Protector making any alteration in his report. On that date the Governor made a final decision that the order was to stand.

The trial judge held the order null and void on the ground that a proper hearing had not been given. He said: "I don't think on the papers before him that His Excellency reopened the question after the 21st of January (i.e. when de Verteuil received a copy of the report). I think he decided by the 21st on the percentages of convictions and failures to earn the sixpence he had before him, which, I think, were in fact wrong, and I do not think he ever gave Mr. de Verteuil an opportunity of putting the actual facts before him as to the sixpence. The Governor had never put Mr. de Verteuil in possession of the percentages on which he was acting and had no idea that he himself had been misled as to these." The Supreme Court of the Islands reversed this decision. The court held that Mr. de Verteuil had had a fair opportunity of being heard in every respect since it had been intimated to

him that there were four grounds that the Governor was considering. The Chief Justice said further: "It is impossible for this court to say how much each of these grounds weighed with the Governor or whether all the grounds taken together seemed to him a sufficient reason for transferring the immigrants. There appears to have been some error in calculating the percentages of prosecutions, etc., but these inaccuracies appear to have been brought to the notice of the Governor... by the respondent. Even if there were inaccuracies in calculating the percentages, I do not think this court has any jurisdiction to hear evidence to show there were inaccuracies."

The Privy Council sustained the decision of the Supreme Court. Lord Parmoor, in rendering judgment, said: "the governor could not properly carry through his duty without making some inquiry whether sufficient grounds had been shown to his satisfaction.... Their Lordships are of the Opinion that in making such an inquiry there is, apart from special circumstances⁽¹⁾ a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement brought forward to his prejudice.... It appears to their Lordships that the correspondence, to which reference has been made, shows that the Governor did not

(1) "It must, however, be borne in mind," Lord Parmoor said, later, "that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or correct or controvert any relevant statement brought forward to his prejudice." (1918) A.C. 557, 560-1.

proceed without giving fair notice to the appellant of the charges made against him, or without giving him a fair opportunity to make an answer to such charges. It is not part of the duty of the court to review the discretion exercised by the Governor, and the evidence directed to this issue is, in the opinion of their Lordships, irrelevant." On the point that the order had been made ex parte, the Board said: "there is no reason why the Governor may not at any time review or alter a decision previously given, and it may be his duty to do so, in the prudent exercise of discretion, on a further consideration of all the relevant factors after full inquiry."

Before commenting on this decision, it will be of interest from the point of view of administrative law to have in mind at the same time the case of Li Hong Mi v. Attorney-General for Hong Kong, 1920,⁽¹⁾ on appeal in the Privy Council from the Supreme Court of Hong Kong. A local ordinance designed to exclude and remove undesirable persons from the Crown Colony of Hong Kong, provided for the issue of a deportation order if, after an inquiry had been made in a prescribed fashion, the Governor in Council was of an opinion, that such an order should issue. The procedure prescribed by the ordinance was that as soon as conveniently may be, after the arrest of the proposed deportee he should be interviewed by the Secretary for Chinese Affairs or one

(1) (1920) A.C. 735.

of his assistants and be asked certain questions with respect to the charges against him. In this case Li Hong Mi gave a general and categorical denial of each charge and he said in particular: "In all the charges I claim in fairness that all the witnesses should be confronted so that we may go into the matter fully."⁽¹⁾ The plaintiff's solicitor applied for copies of all statements made by witnesses against him. But these were refused on the ground that the statute did not require such procedure. The authorities announced, however, that they were prepared to hear all further statements and evidence the accused wished to present. This offer was not accepted. Thereupon, following the directions of the statute, the Secretary for Chinese Affairs, who had himself conducted the interview, recorded his opinion on the facts, and forwarded an adverse report to the Governor. Li Hong Mi was refused a copy of this report, the reason assigned being that the proceedings were confidential except with respect to the answers and evidence presented by the plaintiff. He was also refused an opportunity to appear and make a defence before the Governor in Council on the ground that the procedure prescribed only called for his acting on the report submitted by the Secretary for Chinese Affairs. A deportation order was issued and upheld on review in the Supreme Court of Hong Kong. The Chief Justice said: "The local legislature has entrusted to a governmental official powers of a most exceptional character... In clear language it has

(1) This statement of fact is abstracted from the report of the case in the Supreme Court of Hong Kong, 13 Hong Kong, L.R. 6.

provided that these powers cannot be challenged, assuming that the arbitrary procedure laid down by the ordinance is complied with. This court therefore has no power to overrule its actions."

The other judge of the court concurred in general, but had some doubt whether the Ordinance had actually been complied with in respect to the framing of the charges. The Ordinance stated that it was not to apply at all in the case of a British subject, unless he was a person who in the opinion of the Governor in Council had been guilty of "any criminal offence, or of any other misconduct, connected with.... the prosecution, defence or maintenance of any legal proceeding, etc." The charges against Li Hong Mi, a natural-born British subject, were that, first, he had made a practice of champetry, etc., the charge being framed in general terms, amounting to "perhaps no more than an allegation of bad general reputation," secondly, he had been guilty of misconduct, which was instanced by the citation of two cases of champerty and one of misappropriation of money collected for costs.

When Li Hong Mi appealed to the King against the order of deportation, Viscount Haldane said that the only question on which the Judicial Committee held any doubt was whether it was competent to introduce as one of the charges, and as a ground for the order of deportation, the sweeping allegation that the appellant had made a general practice of champetry, and the other kinds of misconduct charged. Viscount Haldane

held the order invalid. He said that if the report to the Governor had shown the particular case of champetry as examples of the general charge, then the order would have been upheld, but the general charge had been introduced as a separate and distinct ground. The words of the ordinance described only a person who had been guilty of a specific offence and were not satisfied by showing that there was a person who was reputed, however, justly, to possess the character of having made a general practice of the sort of misconduct referred to. "If, therefore," his Lordship concluded, "by the provisions of the Ordinance a charge is inadmissible in such a form as a ground for making the order, the order itself is vitiated, because it is impossible to say how far the introduction of an inadmissible reason may not have affected the minds of the Governor and his Council. An order... cannot stand, if it even may have been based on a ground which is not a legitimate one on which to proceed, in depriving a British subject of his freedom of action."

A comparison of the de Verteuil and Li Hong Mi cases brings out some interesting points on the operation of the traditional rule of law when applied to modern administrative tribunals. Does the rule of law still operate to protect the interests of the individual? Is there a sphere of administrative action into which the courts cannot penetrate and enforce those standards and practices which in a judicial tribunal have become settled as securing for the individual what is accepted as justice? If so, where are the

sanctions that when administrative agencies are dealing with private rights beyond the reach of the courts, such agencies will maintain the principles developed by the common law for sifting evidence and balancing all the interests at stake in a controversy when possible, and yet not neglect or forego at the same time the untold advantages to the state of a benevolent bureaucracy?

In the Li Hong Mi case, the Judicial Committee seized on the fact that a general charge had been introduced against the proposed deportee when the Ordinance only permitted an accusation of some specific offence. On that ground they were able to defeat the deportation order of the Governor. There were definite words of a statute which could be invoked to cover the point and, as is the rule in such cases, they were construed very strictly. One wonders how many offences Li Hong Mi should have committed before it would have been fair to him to say that his reputation had been affected. Lord Haldane intimates that a general charge was possibly reasonable in respect to this particular individual. But as the Ordinance did not permit the Governor in Council to think in general terms, his decision on the matter cannot stand no matter how many specific offences are advanced and supported to his satisfaction in the same report. A report of a general charge, possibly deserved, but unauthorized by the statute, may have influenced the Governor in the exercise of his discretion where three specific offences did not, and so the court will set the order aside as being an unwarranted exercise of the powers delegated by the legislature.

Apply this reasoning to the de Verteuil case. There the Protector submitted a report to the Governor which likewise embodied four charges. In two of these charges no less the trial judge found that the figures given the Governor by the official on whom he relied to secure the facts were unfair to the plaintiff, and in one charge certainly they represented a very much worse state of affairs than actually existed. Although this subordinate official on several occasions went over the figures submitted by the plaintiff, he never corrected the items which he had placed in the hands of the Governor as the Government's side of the question. True, the plaintiff here, where Li Hong Mi did not, had ample opportunity to prove to His Excellency that the report was possibly wrong, yet there always existed the danger that the inaccurate charges would be employed by the Governor to influence the exercise of his discretionary authority. Would the Privy Council say here:- "An Order.... cannot stand if it even may have been based on a ground which is not a legitimate one on which to proceed in depriving a British subject of his freedom of action?" Are partially inaccurate reports by administrative officials grounds on which to deprive any one, indeed, of his freedom of action? The Supreme Court of Trinidad and Tobago said it had no "jurisdiction to hear evidence to show there were inaccuracies" and Lord Parmoor maintained "it was no part of the duty of the court to review the discretion exercised by the Governor, and the evidence directed to this issue was irrelevant."

Apparently, therefore, if the courts adopt the rule that they will not hear evidence on the sufficiency or accuracy of the facts presented to the Governor, nor question his decision reached after a proper hearing on such procedure as the legislature lays down, then there is a sphere of activity of these administrative tribunals within which the operation of the rule of law has become sterilized. As a result, whether Mr. de Verteuil suffered an unwarranted injury to his freedom of action or not, no distortion of the imagination is necessary to see where he may have. The trial judge was of the opinion that he had, however one may disagree in part with his reason for thinking so. On the other hand, no imagination whatever is necessary to see where, assuming the specific charges against Li Hong Ki to be well founded, that the rule of law applied to administrative tribunals actually landed a guilty man his freedom within the colony of Hong Kong. No doubt such a result sometimes occurs in an ordinary court, but the Hong Kong case is significant as evincing the fact that where the courts have continued in a traditional field of review, that of keeping the executive strictly within the scope of legislative authority, they do not necessarily secure to all concerned what the courts call substantial justice. Hong Kong continued to be menaced by an apparently champertous individual because the precise wording of an ordinance was not rigidly adhered to. The Judicial Committee was following the ruling decision of the House of Lords on this matter in Local Government Board v. Arlidge, 1915.⁽¹⁾ In that case Lord Moulton said: "Parliament has wisely

(1) (1915) A.C. 120

laid down certain rules to be observed in the performance of its (i.e. the L.J.C.) functions in these matters and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the courts, and it is not their business to add or to take away from them, or even to discuss whether in the opinion of the individual members of the court they are adequate or not." In view of the possibilities which the Li Hong Yi case suggests it is not unfair to ask whether the courts even in holding administrative agencies to strict compliance with the enactment of the legislature will not sometimes find themselves in the anomalous position of defeating the ends of justice, or the undoubted purpose of the legislature. In this field of judicial review then it cannot be said with certainty that the courts at all times can hold an administrative tribunal to rendering, in its ^{filed} fair and proper decision on the merits with the same facility with which they could ensure such a result in their own field. This defect is inherent in the nature of a judicial review as developed in these communities that proceed on the assumption that Parliament is sovereign.

Where the legislature has not prescribed the necessary procedure for an administrative agency in its finding of facts a further limitation to judicial review becomes apparent. When

the courts first established that they would insist as a condition precedent to the validity of an administrative decision on private rights that a hearing be granted and all the evidence be disclosed, unless the legislature had directed otherwise, they really accomplish this not by way of applying the rule of law but by reading such a requirement into the pronouncement of the legislature. In Smith V. The Queen,⁽¹⁾ 1878, the Judicial Committee maintained that the inquiry of the Land Commissioner in gathering material for his report to the Governor must be "conducted according to the requirements of substantial justice." "These requirements are well known to our law," added the Board, and cited the leading case of Carrel V. Child, 1822,⁽²⁾ where a statute enabled a Bishop, if it should appear to his satisfaction, "either of his own knowledge,⁽³⁾ or upon proof by affidavit," that the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendiary curate. "Does not this", said Lord Lyndhurst in that case, "import inquiry, and a judgment as the result of that inquiry?" As no inquiry had been held by the Bishop his Lordship said that the "meaning and spirit of the Act of Parliament" had not been "properly pursued". Accordingly in Smith V. The Queen, following Carrel V. Child and a line of English cases that continued to import their conception of "substantial justice" into the interpretation of a statute,⁽⁴⁾ Sir Robert Collier said,

(1) See above p. 176

(2) 1822 2 C. and J. Exch. L. 558.

(3) The italics are our own.

(4) See especially Cooper v. Board of Works for the Wandsworth

"Their lordships are of the opinion that the Crown failed to establish that there was such a hearing in this case as would enable the Crown to assert that it was "proved to the satisfaction of the Commissioner" within the meaning of the Act, . . . consequently the Governor had no jurisdiction to issue the proclamation of forfeiture."

But further than implying from the legislative expression the tacit incorporation of the practical maxims of due notice, a fair opportunity to be heard, and full disclosure of adverse evidence, the courts have not gone. To read into the statute a whole code of procedure for the gathering and weighing of facts would be too bold a step for them to take and at the same time bow to the doctrine of the supremacy of Parliament. After all, as Mr. Justice Holmes remarked in Missouri, Kansas and Texas Ry. Co. v. Leg., 1904, (1) "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." The Judicial Committee, therefore, in Smith v. The Queen was careful to state that they did not desire to be understood as laying it down that the Commissioner, in conducting such an inquiry is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the inquiry is conducted according to the requirements of substantial justice." This has been the attitude of the courts to date. They will imply the necessity of a hearing, but will not presume to say how it shall be con-

District (1863) 14 U.E. (N.S.) 180

(1) 194 U. S. 267, 270.

ducted. As Lord Parmoor said in de Verteuil v. Knaggs, 1918: "The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated.... The Governor was not called upon to give a decision on an appeal between parties, and it is not suggested that he holds the position of a judge or that appellant is entitled to insist on the forms used in ordinary procedure. It would not be possible to follow such procedure, since the Governor has no power to examine witnesses or to administer an oath."

What may happen in administrative tribunals when the courts do not review the procedure or sufficiency of evidence is suggested by the recent case of Wilson v. Asquimault and Nanaimo Ry. Co., 1922,⁽¹⁾ in the Judicial Committee on appeal from British Columbia. A statute of the Province enacted that "upon application being made to the Lieutenant-Governor in Council.... showing that any settler occupied or improved land within said railway belt... with a bona fide intention of living on said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him... free of charge, etc." There was no provision for compensation to the railway. Wilson, the executor of the estate of one Ganner, an alleged erstwhile "squatter" on the land to which the statute had reference, filed an application for a deed along with some 180 other persons⁽²⁾. A list of these

(1) (1922) A.C. 202.

(2) See the trial court and Court of Appeal decisions in

(1911) 34 B.C. 233, 234, 235.

applications was sent to the Railway with a description of the land applied for in each case "as nearly ~~as~~ correct as it was possible to obtain from the applicants," so the government wrote. The Railway asked to be allowed to see and copy the declarations supporting these claims. This was refused. About a year after it had received the list of applicants the Railway was given a seven day notice of a hearing before the Governor in Council of the Wilson application. Copies of the declarations were forwarded at the same time. The attorney for the Railway applied for an adjournment for two weeks, presenting very reasonable grounds why it would be impossible to prepare his case in time for the hearing. The trial judge said it was a physical impossibility for any one to do so. Nevertheless the Provincial Secretary told the Railroad's attorney to make his application for postponement to the Executive at the hearing. This was done, and a postponement was refused. The trial judge said: "In view of the fact that no witnesses were present in support of the application and so no one was going to be seriously inconvenienced it is difficult to see any reason for refusing such a reasonable request." The evidence in support of the Wilson claim as to occupation with a bona fide intention of living thereon consisted of a number of solemn declarations taken before a notary public. At the hearing the Railroad's attorney asked that the declarants be produced before the Council and sworn. But this was re-

fused. He pointed out to the Council that the Act provided no means whereby he could subpoena them; that the Council alone could require their presence and give him full opportunity of cross-examination. The hearing over, a Crown grant was issued to Wilson.

The trial court gave judgment for the Railroad on the ground that there had not been a proper hearing. This was affirmed in the Court of Appeal of the Province on a division of four to one, and the additional ground assigned by the majority was that there was not "reasonable proof" within the meaning of the act. The Chief Justice after examining the seven declarations in support of the claim said: "The only declarant who professes to speak from personal knowledge of the locus in quo is W. H. Ganner, son of the deceased. He alleges a distinct recollection of his father 'taking up' this land and having done work 'slashing and piling brush preparatory to clearing.' Not a single one of the declarants venture to say that Joseph Ganner ever resided upon the land. It is, therefore, to my mind quite clear that there is no legal evidence that Ganner occupied the land within the meaning of the Act. But this lack of proof of occupancy does not necessarily defeat the appellant's case. It is sufficient for their purpose to show that Ganner improved the land with a bona fide intention of living on it. The only evidence on this point is that of the son and daughter. That of the daughter amounts to nothing. That of the

son consists of the above-mentioned slashing and piling of brush preparatory to clearing, and which for aught we are told may have been of the most trifling character... He was either not possessed of, or has withheld the facts in respect of the alleged improvements. Not a single person has said that he or she saw the alleged cabin. Not one of the declarants have named a single item of real improvement made upon the land. There is therefore nothing from which the inference may be drawn of a bona fide intention on Ganner's part to live on the land."

Wilson appealed to the King and the British Columbia decision was reversed. Mr. Justice Duff, of the Supreme Court of Canada, delivering the opinion in and for the Judicial Committee said that "the reasons of the learned Chief Justice were cogent reasons in support of the conclusion that the allegations of the appellant's petition were not supported by complete evidence; but their Lordships do not think this, if established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company. Whether or not the proof advanced was 'reasonable proof' was a question of fact, for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any court so long, at all events; as it was not demonstrated that there was no 'proof' before him which, acting judicially, he could regard as reasonably sufficient.... Their Lordships think the Lieutenant-

Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received.... While appreciating both the relevance and the force of the comments made upon this evidence in the Court below, their Lordships are constrained to think that there was some evidence in support of the application, and that there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing."

The Board also refused to entertain any objections to the course taken in the conduct of the hearing. They held that the Railroad had the fullest opportunity to persuade the Governor that the declarations did not constitute "reasonable proof." "The procedure followed must be presumed," they said, "in the absence of some conclusive reason to the contrary, to have been adopted in the exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings."

Mr. Justice Duff said further, "their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adopt the language of Lord Moulton in Arlidge's Case, 1915,⁽¹⁾ 'preserve a judicial temper' and perform his duties

(1) (1915) A.C. 120, 150.

'conscientiously with a proper feeling of responsibility' in view of the fact that serious property rights are at stake." To adopt the language of Lord Shaw in the case referred to, he must "act honestly and by honest means," which terms appealed to his Lordship as being less vacuous than any attempt to paraphrase the expression "natural justice." To adopt Lord Haldane's words, he "must act judicially" and "without bias". Or Lord Loreburn's words in Board of Education v. Rice, 1911,⁽¹⁾ he "must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

But are these precepts any guarantee of the efficiency of an administrative tribunal when making far-reaching decisions that affect private property and individual freedom? In a sense they are a confession of impotence on the part of the Courts. How far would they help in a situation that is easily suggested by the de Verteuil and Wilson cases? Some actual decisions would seem to take away all force from their meaning and all their value as precepts. Why have they been enunciated? Lord Loreburn says because the duty to adhere to them lies on anyone who decides anything. It is respectfully submitted that that is not the proper mode of approaching the problem. The function of a Court in any part of His Majesty's dominions in applying a statute to any situation that arises under it, is to seek the normal, current meaning of the words and phrases written by the legislature. To embark on any excursion to explore the legislative intent is not only futile but an unwarranted judicial enterprise. As Lord Macdonald said

(1) (1901) A.C. 588.

in the Arlidge Case: "These rules are beyond the criticism of the Courts, and it is not their business to add to or to take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not." No court was ever intended to be the keeper of the Parliamentary conscience.

As much has in fact been held by the Judicial Committee. A mining Act of 1874 in New South Wales once conferred upon the Governor power to suspend a pastoral lease so far as should be necessary for certain defined purposes which concerned the safety and welfare of the public in the newly proclaimed gold fields. There was no provision in the statute where in the case of suspension the injury to the lessee was out of all proportion to the compensation stipulated. This worried the Supreme Court of the Colony, so in order to prevent injustice to individuals they proceeded to construe the statute so that its effect would be otherwise. But the Judicial Committee reversed their decision in Cook V. Ricketson,⁽¹⁾ 1901, saying: "of the necessity of intervention in any particular case, the Governor, acting on the advice of his responsible ministers, is and must be the sole judge.....The words of S. 13 are plain and unambiguous, and their Lordships are of the opinion that they must receive their ordinary meaning, and have full effect given to them, even though the result may be that now and then a grievous hardship may be inflicted on an individual for whom

(1) (1901) A.C. 588

no adequate compensation is provided in the act." Thus when pushed to the logical limit the Court retires into its tortoise shell of indifference to the justice of legislative enactments.

Why then should they indulge in construing the Acts of Parliament as setting up these high sounding precepts? The only way they can be applied to an administrative tribunal is to make further deductions in the nature of certain rules of thumb, such as, due notice, a fair opportunity for all parties to be heard on their own behalf and to attach evidence against them, etc. When a court is actually asked to pass on what is due notice and a fair hearing, it makes the conspicuous announcement that this interpretation has been left by the legislature to the administrative tribunal to be decided at its discretion. If, as a result, the court intimates, the Governor's discretion covers a multitude of sins, then that is the fault of the legislature and not the courts. And thus the court beats the devil about the bush until it is back to where it started with the legislative directions to an administrative tribunal in its assigned task.

Hence if this talk of "natural justice" creep into the language of the courts in these cases we have been reviewing? As we have seen Smith V. The Queen 1878, referred to Capel v. Child, 1852, and this is apparently the fountain-head of the modern cases on so called administrative law.

It will be remembered in that case the legislature had duly enacted that "whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that by the negligence of the spiritual person holding the same (i.e. benefice), the ecclesiastical duties of such benefice are inadequately performed;- such bishop may, by writing under his hand, require the spiritual person holding such benefice to nominate to him a fit person or persons.....; specifying therein the ground of such proceedings." The requisition of the Bishop to the plaintiff read: "whereas it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage are inadequately performed, by reason of your negligence, we do, etc." The court gave judgment for the plaintiff mainly on the ground that he had had no hearing. After quoting the statute, Lord Jynderhurst, C. B., asked, - "Does not this import an inquiry?" - in the face of the words of the Act: "of his own knowledge." Then referring to the requisition he said: "It is in form a judgment; it is in effect and consequence a judgment. It seems to me, therefore, considering the principles of justice, that this construction of the Act could hardly be more necessary, if it had been absolutely required by the language of the Act that a previous summons should be issued." Bayley, B., also asked, "is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard? In our

Courts of Law, you cannot obtain a judgment against a party, without entering an appearance for him." It is to be hoped that the idea of imposing court methods on an administrative tribunal which these judges started rolling has been effectively stopped by Lord Shaw's remark in the Arlidge Case: "the assumption that the methods of natural justice are ex necessitate those of Courts of Justice is wholly unfounded." Is it not abundantly obvious from the language of Capel v. Child that the Court transgressed the scope of judicial review and deliberately "guessed", to use the words of Viscount Haldane in the same Arlidge Case, "at the meaning of the Act of Parliament?" Capel v. Child may be supported, however, on a legitimate function of judicial review. The Act requires the Bishop to specify in his requisition the ground for his proceedings, and all he stated in his requisition was a general allegation of negligence in the incumbent. Such Acts of Parliament may be construed strictly and so as Bayley, B., said, "the Bishop is not to generalize the grounds of negligence, but he is called upon to specify distinctly the nature of the negligence, in order that the other party may have the means of giving a specific answer."

Only one precedent was cited in Capel v. Child, namely the case of The King v. Benn and Church, 1795⁽¹⁾ This was on the point of an opportunity of being heard. Before Lord Kenyon,

(1) 6 Term. Rep. Durnford and East 198

Ch. J., in the King's Bench, there was argued a rule for a mandamus to the defendants, who were justices of the peace, to grant writs of distress, which were in the nature of an execution, to levy several sums of money on different persons who had refused to pay a poor rate. The answer given to the application was that there should have been a previous summons by the magistrates to the respective rate payers in order that they might have an opportunity of showing a sufficient reason why a warrant of distress should not be issued. In this answer Lord Kenyon concurred, saying, "it is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard." The rule was discharged, although counsel pointed out that if any cause should be shown why such a warrant should not issue it might be returned on the writ. The force of his Lordship's maxim in its applicability to this case is somewhat abated by observing that it is hardly a punishment to a man to pay a rate he owes and refuses to pay. However, this dictum is the source of the language in the cases we have been reviewing.

It is very interesting to observe after surveying the modern cases, how the courts in the eighteenth century in wrestling with judicial review of administrative action under the statute dealing with the collection and application of the Poor's Rate, first took the correct method of approach to this question, and then soon found themselves supporting a false doctrine which sprang from Lord Kenyon's dictum.

The statute⁽¹⁾ to be construed by the courts read: "It shall be lawful for the church wardens and overseers by warrant from two Justices of Peace, to levy the said sums of money of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offenders goods, etc." The first case which construed this statute, we submit, did so correctly. This was The Parish of St. Luke v. The Justices of Middlesex, 1745, in the King's Bench,⁽²⁾ and it involved a rule to show cause why the court should not grant a mandamus to the Justices of Peace, commanding them to issue a warrant of distress without first summoning and hearing the parties who had refused to pay. It was strongly argued that it had always been the custom to have such a hearing. But the rule was made absolute. Lee, C. J. said: "a writ of mandamus will not give the justices any power they had not before, and therefore it is to be considered what power the statute 43 Eliz. C.2, S. 4 gives them; and in that there is no direction that the party shall be summoned to show cause." Foster, J., placed his concurrence in allowing the mandamus on the ground that the duty of the Justices to grant a warrant was purely ministerial.

(1) 43 Eliz. C. 2, S. 4 "It shall be lawful, as well for the present as subsequent church wardens and overseers or any of them, by warrant from two justices of the peace to levy the said sums of money, and all arrearages, of everyone that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, rendering to the parties the overplus; and it shall be lawful for any such two justices of the peace to commit him or them to the common gaol of the county, there to remain without bail or mainprize, until payment of the said sum, arrearages, and stock."

(2) 1 Conat's Bott 243, pl. 255; 1 Wilson 133

Just fifty years later a rule for a similar mandamus, as we have seen, was argued before Lord Kenyon in The King v. Benn and Church, 1795, and Lee's, C. J. decisions was cited as controlling in the matter. Lord Kenyon, however, refused to accept it and, without referring to the statute or to its portent, he discharged the rule on the strength of the maxim already quoted. Compare his Lordship's attitude in this case with that in Rex v. Newcombe, 1791.⁽¹⁾ There a statute required the overseers to give public notice in the church on the "next Sunday" of every rate for the relief of the poor allowed by the Justices of the Peace.⁽²⁾ No rate was to be valid unless this was done. A certain rate was attacked in the King's Bench on the ground that notice had been published on the third and not the first Sunday. Counsel had argued that the object of the Act was to secure notoriety for the rate in order to prevent secret levies,⁽³⁾ but his Lordship held:

(1) 1 Const's Bott 253 pl. 240; 4 Term. Rep. 368.

(2) 17 Geo. II, C. 3, S. 1.

(3) The passing of 17 Geo. II, C. 3 to remedy abuses which had grown up in the administration of the poor's rate well illustrates the main point of our argument. If it is brought home to the legislature that the existing procedure does not secure satisfaction to all concerned, remedial steps will be taken. The prior safeguards which had proved inadequate will be found in 43 Eliz. C. 2, S. 6: "Provided always, that if any person or persons shall find themselves grieved with any sess or tax, or other act done by the said church wardens, and other persons, or by the said Justices of the Peace; at these general quarter sessions, or the greater number of them, to take such order therein, as to them shall be thought convenient; and the same to conclude and bind all the said parties."

17 Geo. II, C. 3 also provided (S.2) that on payment of a shilling anyone could inspect the rates, and secure a copy of twenty-four names for sixpence; (S.3) that an overseer who refused to permit inspection should forfeit £20.

"The Act of Parliament requires a particular step to be taken before the rate can be valid ... that direction was not pursued in this case, and consequently the rate itself is invalid." Two years after Rex v. Benn and Church Lord Kenyon was called upon to decide in Harper v. Carr⁽¹⁾ 1797, involving the application of a statute, whether a Justice of the Peace, in issuing a warrant of distress, acted in a ministerial or in a judicial capacity. Rex v. Benn and Church had required the Justice of the Peace to hold a hearing before issuing a warrant but had not put it on the ground that it was because he was acting judicially. Now, however, the court, having taken that step, as a result of spurious interpretation of the statute, was forced to hold that the Justice did act in a judicial capacity. The court, pushed to this extremity, turned back to the statute for the first time to justify their decision. They said: "Cases now referred to show that the justices do not act ministerially. Besides the statute 43 Eliz. C. 2 requires a warrant signed by two Justices to enable them to levy the money due, which would have been unnecessary if the Justices were not to exercise a discretion whether they should grant or refuse the warrant; that circumstance, I think, shows that the legislature did not intend that a warrant should be granted as a matter of course, but that the Justices should first inquire into the merits of the case."

(1) (1797) 1 Const's Bott 257, pl. 243; 7 Term. Rep. 270

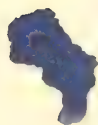
Thus was the sound beginning of Lee, C.J., in the case of The Justices of Middelsex perverted into the false and futile doctrine that was taken up by Capel v. Child and transmitted down to our modern cases in judicial review of administrative action.

It is submitted, in conclusion, that the courts by their review of the work of that administrative tribunal considered herein, have retarded its healthy development as an arbiter of private rights. If they had not made it appear that they were holding such tribunals up to a certain due process which they themselves had developed in and for their particular work, it would have soon been realized that the legislature had created an authority in the land that sometimes gave little weight to interests which would otherwise be protected, either by the procedure of the courts, or by, at least, the deliberation of a Parliament. The Governor in Council would have developed methods of procedure and deliberation himself which by trial and error would have finally received the sanction of popular acceptance, or failing that, the legislature would have effected as much under pressure from the electorate. As the Judicial Committee have themselves in another but similar connection said: "If these powers be abused, or be found to be in their exercise hurtful, the legislature which conferred them can withdraw or restrict them, or subject their exercise to control. " (1) It, as Lord Holt remarked in 1700,

(1) Canadian Pacific Railway v. Toronto (1911) A. C. 461, 470 dealing with orders of the Railway Board of Canada.

"an Act of Parliament can do no wrong, though it may do several things that look pretty odd,"(1) it is for Parliament and not the courts to see that no injury results where no injury was intended. As matters stand on the authority of the decisions, the courts are siding and abetting the Governor in making at times a stalking-horse of his discretion.

(1) City of London v. Wood 12 Mod. 669, 687, (1700).



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